TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 295

COLONEL HENRY S. ROBERTSON, PRESIDENT, ARMY REVIEW BOARD, PETITIONER

vs.

ROBERT H. CHAMBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1950
CERTIORARI GRANTED NOVEMBER 27, 1950

APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,351

ROBERT H. CHAMBERS,

Appellant,

vs.

BRIG. GEN. E. C. B. DANFORTH, JR., President,
Army Review Board,

Appellee.

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX TO BRIEFS

1 Filed Mar 29 1948 Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 1280-'48

ROBERT H. CHAMBERS,
Broadalbin, New York,
Plaintiff,

v.

Brig. Gen. E. C. B. DANFORTH, Jr., President, Army Review Board, 2120 Sixteenth Street, N. W.
Washington, D. C.,
Defendant.

Complaint for Proceedings in the Nature of Mandamus

The plaintiff, for his cause of action herein, complains of the defendant and alleges:

FIRST: The plaintiff is a citizen of the United States and a resident of the State of New York; the defendant is a citizen of the United States and a resident of the District of Columbia. Jurisdiction of this court is invoked under Section 301 of Title II, D. C. Code, 1940 ed.

SECOND: The defendant is, upon information and belief, the duly appointed, qualified and acting President of the Army Disability Review Board, and as such President, by reason of directives issued by the Secretary of the Army exercises the powers and fulfills the functions conferred upon the Secretary of the Army by Section 302 of the Servicemens Readjustment Act of 1944, as amended.

THIRD: This is an action brought against the said defendant in his official capacity to obtain an order and judgment of this court requiring the said defendant to discharge his respective duties according to the requirements of the

statutes governing the functions of the Army Disability Review Board, and more particularly, to require said defendant to exclude from plaintiff's record any documents other than plaintiff's service records and documentary evidence submitted by plaintiff.

FOURTH: On or about June 22, 1944, the Congress enacted a statute known as the Servicemens Readjustment Act of 1944 (P. L. 346, 78th Cong. 2d Sess., Title 38 USC Secs. 693-697 inclusive).

Section 302(a) of that statute as amended provides *inter alia* that the Secretary of the Army shall establish boards of review consisting of five Army officers, two-fifths of whom shall be members of the Medical Corps, for the purpose of reviewing the findings and decision of retiring boards pursuant to whose decision an officer had been retired or released from active service without pay. The said section of said statute provides that:

"Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." A copy of the entire text of Section 302 is attached hereto and marked Exhibit "A".

FIFTH: After the passage of said Act the Secretary of War (now known as the Secretary of the Army) established the Secretary of War's Disability Review Board, (now known as Army Disability Review Board) and by regulations issued on or about October 21, 1944, provided that such Board should have a President who should have general charge of the business of the Board. The regulations provide by Paragraph 2, sub-paragraph (c) thereof that,

"The Adjutant General will assemble all available War Department and/or *other records* pertaining to the health and physical condition of the applicant. Such records together with the application and any supporting documents submitted therewith, will be transmitted to the president of the board." (Emphasis supplied)

3 The procedure followed at a hearing held by said Board is that the papers transmitted by the Adjutant General to the President of the Board are submitted to the Board which holds the hearing at the time of the opening of the hearing. These papers together with oral and documentary evidence submitted by the applicant constitute the record upon which the decision of the Board is based.

SIXTH: The plaintiff was honorably discharged as a Captain of the Army of the United States on October 2, 1942, for physical disability as the result of the findings and decision of a retiring board convened at Lovell General Hospital on August 5, 1942, and after the passage of the said statute duly applied for a review of his discharge by the Army Disability Review Board (then known as the Secretary of War's Disability Review Board).

A hearing was held pursuant to Section 302 of the said statute, and at said hearing the record presented to the Board was in accordance with the terms of the statute in that it consisted solely of the plaintiff's service records and evidence submitted by him.

SEVENTH: As a result of said hearing the Secretary of War's Disability Review Board on June 11, 1945, reversed in part and affirmed in part the findings of the Retiring Board pursuant to whose action the plaintiff had been discharged for physical disability. Plaintiff subsequently petitioned said board for a reconsideration and rehearing of his appeal for review, which petition was granted on May 19, 1947, and on September 10, 1947 plaintiff was notified that the rehearing would take place on October 10, 1947.

EIGHTH: On or about September 22, 1947, plaintiff and his counsel went to the Pentagon to the offices of the Army Disability Review Board for the purpose of
4 reviewing the record and preparing for the rehearing. Upon examining said record plaintiff and his

counsel found that certain Veterans Administration records bearing various dates in the year 1944, two years after plaintiff's discharge from the Army had been added to the record in plaintiff's case.

NINTH: Plaintiff, on September 24, 1947, acting through his counsel, protested by letter against the inclusion of these records on the ground that they were not service records; that the addition of these records was in violation of the plain words of the statute setting up the board and concluded with a request that the Veterans Administration records be removed from the file. A copy of said letter is attached hereto and marked Exhibit "B".

Pursuant to plaintiff's request the hearing was postponed until after a ruling had been made on this request.

TENTH: Under date of October 28, 1947, plaintiff's counsel was advised by letter signed by defendant that the request for removal of the Veterans Administration records was "not favorably considered". A copy of said letter is attached hereto and marked Exhibit "C".

ELEVENTH: Plaintiff's counsel, upon being advised of this ruling, requested by letter dated November 13, 1947, that the request be reconsidered, and was advised by letter dated December 9, 1947, and signed by defendant that "no reason is perceived" to change the original ruling on the request. Copies of said letters are attached hereto and marked respectively Exhibits "D" and "E".

TWELFTH: Plaintiff, through counsel, has thus made demand on defendant, and defendant has arbitrarily, unlawfully and wrongfully refused to exclude from plaintiff's record documents which are not, under the statute, properly a part of his record. Plaintiff's case is now set for rehearing on April 6, 1948, and plaintiff believes and, therefore, alleges that the defendant intends to include in the record to be submitted to the Board which will hear his case the said Veterans Administration records in violation of the express terms of the statute, which, as here-

tofore alleged, provides that such review shall be based upon "all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

THIRTEENTH: Plaintiff has no remedy at law, adequate, complete or otherwise.

WHEREFORE, plaintiff prays:

(a) That this court issue its mandatory order compelling the defendant to take such action as may be necessary to exclude from plaintiff's record any documents originating with the Veterans Administration and to restrict such record to plaintiff's service records and documents submitted by plaintiff as evidence.

(b) For such other, different and further relief as may to the court seem just and proper.

/s/ H. Russell Bishop
H. Russell Bishop
1025 Connecticut Avenue
Washington 6, D. C.
Attorney for Plaintiff

Driscoll and Bishop
Of Counsel.

• • • •

7 Filed Mar 29 1948 Harry M. Hull, Clerk

1280-'48

Exhibit "A"

Section 302 of the Service Men's Readjustment Act of 1944 (P. L. 346, 78th Congress, 2d Session; 38 USC Sec. 693) as amended.

(a) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall

be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after June 22, 1944, whichever is the later.

(c) As used in this section —

(1) the term "officer" means any officer subject to the laws granting retirement for active service in the Army, Navy, Marine Corps, or Coast Guard, or any of their respective components;

(2) the term "counsel" shall have the same meaning as when used in section 693h of this title.

8 Filed Mar 29 1948 Harry M. Hull, Clerk

1280-'48

Exhibit "B"

September 24, 1947

Secretary of War's Disability Review Board
The Pentagon
Washington 25, D. C.

Docket No. 323
Case No. 94
Captain Robert H. Chambers, 0-268427

Attention: Lt. Col. R. O. Davidson
Executive Secretary

Gentlemen:

On behalf of my client, Captain Robert H. Chambers, it is hereby requested that the record in his case be corrected by removing therefrom certain reports from the Veterans Administration which have recently been added to his file. These records include a "Report of Examination at Completion of Observation Period of the Veterans Administration Facility at Canandaigua, New York, dated October 25, 1944; Special Neuropsychiatric Report made at Castle Point, New York, dated April 25, 1944, and Veterans Administration Medical Form 2545, dated May 16, 1944."

This is a proceeding under Section 302(a) of the Servicemen's Readjustment Act of 1944 as amended by Public Law 268, 79th Congress, and provides that the review therein provided for "shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

Captain Chambers was discharged on October 4, 1942, and any reports by the Veterans Administration subsequent to that date would not be a part of his service record. The term "service records" as used in the statute obviously means the records of the branch of the armed services of which the officer was a member prior to his discharge, and

does not include the records of other departments of the government.

It is accordingly requested that the reports of the Veterans Administration be removed from the file and that the hearing now set for October 10, 1947, be postponed until at least three weeks after the date of which the officer and his counsel shall have been notified of the ruling on this request.

Very truly yours,

HRB/1m

bcc: Mr. Chambers

9 Filed Mar 29 1948 Harry M. Hull, Clerk

1280-'48

Exhibit "C"

ECBD/evo

DEPARTMENT OF THE ARMY
Army Disability Review Board
Washington 25, D. C.

In Reply Refer
to Case No.: 94
Docket No.: 323

28 October 1947

Mr. H. Russell Bishop
1025 Connecticut Avenue
Washington 6, D. C.

Dear Mr. Bishop:

Further reference is made to your letter of the 24th of September 1947 and to my reply thereto under date of the 29th of September 1947 in connection with the rehearing of the case of Captain Robert H. Chambers, 0268427, Cavalry, Reserve, scheduled for the 10th of October 1947.

After full and careful consideration of your request, it has been determined that in view of the broad powers conferred on the Army Disability Review Board, both by statute and regulation, that the language of Section 302 of the Act of 22nd June 1944, as amended, which provides in pertinent part:

"* * * such review shall be based upon all available service records relating to the officer requesting such review and such other evidence as may be presented by such officer."

is descriptive in character and does not preclude consideration by the Army Disability Review Board, of otherwise admissible evidence obtained by the Board (on its own motion) from the Veterans Administration. Your request that the record in this case "be corrected by removing therefrom certain reports from the Veterans Administration which have recently been added to his file" is, therefore, not favorably considered.

In accordance with your request for postponement for at least three weeks after notification of the above decision, this case is rescheduled for hearing at 9:00 A.M. on the 24th of November 1947.

Very truly yours,
E. C. B. DANFORTH, JR.
Brigadier General, USA
President.

Exhibit "D"

November 13, 1947

E. C. B. Danforth, Jr., Brig. General, U.S.A.
President, Army Disability Review Board
Washington 25, D. C.

Reference Case No. 94
Docket No. 323
Robert H. Chambers

Dear General Danforth:

This will acknowledge receipt of your letter of October 28, 1947, being in further reply to my letter of September 24, 1947, which requested that the record in the case of Captain Robert H. Chambers be corrected by removing

therefrom certain reports from the Veterans Administration. The grounds for asking that these records be removed from the record was based upon the language used in Section 302 of the Act of June 22, 1944, as amended, which provides that the review of the action of a retirement board by the Disability Review Board shall "be based upon all available service records relating to the officer requesting such review and such other evidence as may be presented by such officer."

In replying to my letter and advising me that my request had not been favorably considered, you stated that the reasons for denying my request were that in view of the broad powers conferred on the Army Disability Review Board both by statute and regulation that the language in the statute was considered to be descriptive in character and would, therefore, not preclude consideration by the Board of otherwise admissible evidence obtained by the Board on its own motion from the Veterans Administration.

I have examined the opinion of the Judge-Advocate General which is the basis of your letter, but, for the reasons set forth below I am convinced that the opinion is erroneous.

1. The underlying basis for the conclusion reached by the Judge Advocate General seems to be the provision in the statute which states:

"In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decisions are being reviewed."

Proceeding from this the opinion relies upon Section 1248 of the Revised Statutes (10 U. S. C. 963) which provides:

"A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court martial and of a court of inquiry as may be necessary for that purpose."

and then cites paragraph 23a of AR 605-250 which provides that:

"The (retiring) board has the same power and authority as courts martial and courts of inquiry to compel the production of books, records, and papers material to the investigation." *Sec. R. 8 1248 (M. L. 1939, sec. 325)*

The opinion also cites sub-paragraph (a) of Paragraph 75 of the Manual for Courts-Martial concerning the general duties of the Court or retiring board with the powers of a court martial in regard to the introduction of evidence before such Court or board.

The Judge-Advocate General's opinion then quotes in part from the rules promulgated by authority of the Secretary of War governing procedure by the Army Retiring Board and quotes from those rules as follows:

"* * * The Adjutant General will assemble all available War Department and/or *other records* pertaining to the health and physical condition of the applicant. Such records together with the application and any supporting documents submitted therewith, will be transmitted to the president of the board."

7. "a. It will be the duty of the examiner to examine all War Department records and *all available evidence*, together with all contentions submitted on behalf of applicant and evidence in support thereof and to prepare an impartial written summary thereof, which shall be advisory in character only, and will set forth separately

* * * *

(5) Summaries of such pertinent War Department records or other evidence which may be material to the issue whether considered by the previous retiring board or not." (underscoring supplied.)

The opinion then concludes the language "such review shall be based upon all available service records, etc.," is descriptive in character. With this I agree. It is not merely descriptive, however, it is definitive, and describes by classification the documentary evidence which the Re-

view Board may consider, and this by necessary implication excludes from its consideration other documentary evidence except that offered by the officer. The conclusion reached by the Office of the Judge-Advocate General is tantamount to the conclusion that the term "service records" means service records plus such other documentary evidence as the Board in its absolute discretion may for reasons of its own wish to consider.

12

The interpretation of the statute and the conclusion set forth in the opinion of the Judge-Advocate General fails to take into consideration the scheme of the statute and the purposes for which it was enacted. The statute insofar as the Department of the Army is concerned was enacted for the purpose of enabling all officers who had been retired or released from active service without pay pursuant to the decision of an Army Retiring Board to a review of the findings and decision of the retiring board which had adjudicated his case. The statute in the sentence immediately following the sentence setting forth the duty of the board of review sharply delimits the evidence upon which such review shall be made by stating:

"Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

The reason for restricting the evidence to the service records of the officer is obvious. The Disability Review Board is set up for the purposes of determining whether or not the action of the retiring board should be sustained or reversed. The board of review in order to function within the intent of the statute must therefore place itself in the position of the retiring board whose action it is to review. This can only be accomplished by restricting the record to those facts which the retiring board had before it, in other words, to the service records of the officer which would, *ex necessitate*, include the proceedings of the retiring board, and "such other evidence as may be presented by such officer," which he may present for the pur-

pose of showing that the action of the retiring board was erroneous.

While it smacks of impertinence to lecture a board of army officers and especially the officers of the Judge-Advocate General upon the meaning of the term "service records" insofar as an Army officer is concerned, — I repeat the substance of my letter of September 24, 1947, that the term "service records" as used in the statute means, and can only mean, the sum total of all the papers contained in the Department of the Army relating to an officer from the time of his enrollment to the date of his discharge or retirement. It is axiomatic that in construing the words used in a statute that they will be given the meaning which is accorded them by the common understanding, and I submit, the term "service records" is universally understood by military men to mean what I have set forth above.

The subsequent provision that the review board "shall have the same powers as exercised by, or vested in, the board whose findings and decisions are being reviewed," in no way limits the provisions restricting the review to "service records." The inquiry here should be directed to determining what powers the retiring board had, because it is those powers, and no other, which are conferred upon the review board. It cannot be denied
13 that the retiring board had the powers conferred upon it by section 1248 of the Revised Statutes, and that those powers were virtually plenary for the purpose of making a full inquiry into "the nature and occasion of the disability of any officer."

The retiring board in this case, however, sat at Lovell General Hospital on August 18, 1942. However great the powers conferred upon that board by statute and regulations, there was one which it did not have and that is the power, or gift, of clairvoyance. That retiring board could not consider a report or reports to be written by another government agency two years subsequent to its deliberations, and by reason of the terms of the statute the review

board may not consider, as a part of the officer's service record, that which was not considered by the retiring board.

With respect to the regulations issued by the Secretary which directed the Adjutant General to assemble in addition to War Department records "other records pertaining to the health and physical condition of the applicant," it is submitted that inasmuch as such a direction attempts to enlarge the record beyond the limits set by the statute that it is invalid and is not authority for including the Veterans Administration records as part of Captain Chambers' service records. The Disability Review Board, while appointed by the Secretary of the Army, is a creature of statute and the mere conferring of the appointive power on the Secretary would not carry with it the power to make rules and regulations governing procedure before the Board enlarging or restricting the terms of the statute.

Captain Chambers, the same as any other applicant for review of his case by the Army Disability Review Board, is entitled to a review according to the terms of the statute giving him the right of review. He is not entitled to and does not ask for more than that accorded him by the statute, to require him to accept less than that is to work an injustice upon him and, in effect, to give him a review according to the rules and regulations of the Army instead of the review to which he is entitled by statutory grant.

In view of the foregoing it is asked that this matter again be reviewed and that the request contained in my letter of September 24, 1947, that the records of the Veterans Administration be removed from Captain Chambers' file and be returned to the Veterans Administration be granted. It is further requested that the date of the hearing now set for November 24, 1947, be postponed for a period of at least three weeks subsequent to a ruling on this request for reconsideration.

Respectfully yours,

HRB/as

14 Filed Mar 29 1948 Harry M. Hull, Clerk

Exhibit "E"

ECBD/cvo

DEPARTMENT OF THE ARMY
Army Disability Review Board
Washington

1280 - '48
9/December/1947

In reply refer
to Case No.: 94
Docket No.: 323
Mr. H. Russell Bishop
1025 Connecticut Avenue
Washington 6, D. C.
Dear Mr. Bishop:

Reference is made to your letter of 13 November 1947, renewing your request that certain Veterans' Administration records be removed from the case file of Captain Robert H. Chambers, 0268427, Cavalry, Reserve, the review of whose case has previously been scheduled for 10 October 1947 and 24 November 1947 and postponed at your request.

After reexamination of the opinion of The Judge Advocate General in the light of the questions raised in your letter of 13 November 1947, no reason is perceived to depart from the views expressed to you in my letter of 28 October 1947, nor to change the decision with respect to the Veterans' Administration records in Captain Chambers' file. This office, therefore, adheres to its position in not favorably considering your request of 24 September 1947 for removal of the records in question.

This case is accordingly rescheduled for hearing at 9:00 A. M., 8 January 1948. If this date is not agreeable to you, kindly advise this office.

Very truly yours,
E. C. B. DANFORTH, JR.
Brigadier General, USA
President.

• • • •

15 Filed Jan 12 1949 Harry M. Hull, Clerk

Motion to Dismiss

Comes now the defendant, by George Morris Fay, United States Attorney in and for the District of Columbia, and D. Vance Swann and William T. Becker, Attorneys, Department of Justice, and moves the court to dismiss this case for lack of jurisdiction and in support thereof alleges as follows:

I

The complaint fails to state a claim against the defendant or the United States Government upon which relief can be granted.

II

The court has no jurisdiction to hear and consider this action.

III

The complaint fails to set forth a sufficient statement of the grounds upon which the court's jurisdiction depends and cites no statute authorizing a suit of this nature against the United States of America or its agents as required by Rule 8(a)(1) of the Federal Rules of Civil Procedure.

IV

This action, which is in the nature of a mandamus, would not lie against the defendant who acted within the scope of his official capacity in the proper exercise and discretion committed to him by statute.

V

The plaintiff has not exhausted his administrative remedies in the Department of the Army.

16

VI

Judicial review of the action of the Army Discharge Review Board is precluded by statute (Section 693h, Title 38, U. S. C. A.).

VII

The United States has not consented to be sued or that its agents acting in the scope of their official authority for the United States can be sued in a case of this nature.

VIII

This action in the nature of a mandamus would not lie against the President of the Army Review Board or the Secretary of the Army who are vested by statute with discretion to determine the type of discharge and/or who is entitled to retirement pay.

IX

There is no statutory authority upon which this action can be based.

WHEREFORE, the defendant prays that this motion to dismiss be granted.

/s/ George Morris Fay
George Morris Fay
United States Attorney

/s/ D. Vance Swann
D. Vance Swann
Attorney, Department of Justice

/s/ William T. Becker
William T. Becker
Attorney, Department of Justice

• • • •

25 Filed Apr 25 1949 Harry M. Hull, Clerk

Informal Memorandum

The complaint herein must be dismissed. It clearly appears that plaintiff has not exhausted his administrative remedies. Upon that ground alone the action is prematurely brought. Aside from that consideration however the complaint must be dismissed upon its merits. This court lacks jurisdiction to control the admissibility of evidence by an administrative board by mandamus. Keim v. United States, 177 U. S. 29. The action of the defendant board was a matter within the discretion of the board. It was not ministerial in the sense that it may be controlled by mandamus but requires the exercise of judgment. The courts will not guide and control executive boards in the matters committed to the judgment and discretion thereof in the discharge of official duties.

Counsel for defendant will submit an appropriate order dismissing the complaint.

/s/ F. Dickinson Letts
F. Dickinson Letts
Judge

• • • •

26 Filed Apr 27 1949 Harry M. Hull, Clerk

Order

This cause coming on to be heard on the defendant's motion to dismiss, and the court after hearing argument of counsel being fully advised in the premises is of the opinion that the court is without jurisdiction in this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant's moton to dismiss be and

the same, is hereby sustained and that this case is dismissed with prejudice at the cost of the plaintiff.

/s/ F. Dickinson Letts
F. Dickinson Letts
Judge

APPROVED AS TO FORM:
/s/ H. Russell Bishop
H. Russell Bishop
Attorney for the Plaintiff

• • • •

27 Filed May 9 1949 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this *ninth* day of *May*, 1949, that *the above-named plaintiff* hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the *27th* day of *April*, 1949 in favor of *defendant and* against said *plaintiff, dismissing the complaint.*

/s/ H. Russell Bishop
Attorney for *Plaintiff*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10351 April Term, 1950

Wednesday, March 22, 1950

* * * * *

ROBERT H. CHAMBERS, *Appellant*

v.

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Appellee*

Before Honorable Harold M. Stephens, Chief Judge, and E. Barrett Prettyman, Circuit Judge, and J. Kimbrough Stone, Circuit Judge sitting by designation.

Argument commenced by Mr. H. Russell Bishop, attorney for Appellant, continued by Mr. Thomas E. Walsh, attorney for Appellee, and concluded by Mr. H. Russell Bishop.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10351. April Term, 1950.

ROBERT H. CHAMBERS, *Appellant*

v.

BRIG. GEN. E. C. B. DANFORTH, JR., President, Army Review Board, *Appellee.*

Before: Stephens, Chief Judge, Prettyman and Stone, Circuit Judges.

Order

Upon consideration of appellant's motion to substitute Colonel Henry S. Robertson herein in the place and stead of appellee Brig. Gen. E. C. B. Danforth, Jr., on the ground that Brig. Gen. E. C. B. Danforth, Jr., was relieved of his duties as President of the Army Review Board during the pending appeal, and that Colonel Henry S. Robertson was appointed as his successor on November 12, 1949;

and it also appearing that this motion to substitute has been served upon counsel for Colonel Henry S. Robertson and Brig. Gen. E. C. B. Danforth and that counsel for these parties has filed no objections thereto, It is

ORDERED by the Court that Colonel Henry S. Robertson be, and he is hereby, substituted as appellee herein in the place and stead of appellee Brig. Gen. E. C. B. Danforth, Jr.

Per Curiam

Dated April 3, 1950.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10351

ROBERT H. CHAMBERS, *Appellant*,

v.

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Appellee*

Appeal from the United States District Court for the District of Columbia.

Argued March 22, 1950 Decided June 12, 1950

Final brief filed May 3, 1950

Mr. H. Russell Bishop for appellant.

Mr. Thomas E. Walsh, Attorney, Department of Justice, with whom *Assistant Attorney General Morison* and *Mr. George Morris Fay*, United States Attorney, were on the brief, for appellee. *Mr. Joseph M. Howard*, Assistant United States Attorney, also entered an appearance for appellee.

Before STEPHENS, Chief Judge, and PRETTYMAN and KIMBROUGH STONE,* Circuit Judges.

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* Sitting by designation.

STONE, Circuit Judge: Appellant was honorably discharged without pay as a Captain of the Army, for physical disability, by a decision of an Army Retiring Board. After the subsequent passage of the Servicemen's Readjustment Act, he applied for a review of his discharge by a Disability Board of Review (38 U. S. C. A. § 693 i (a)). A hearing before the Board of Review resulted in part affirmance and part reversal of the findings of the Retiring Board. On his petition, appellant was granted a rehearing and reconsideration. Prior to the rehearing, appellant discovered that certain reports of the Veterans' Administration (much later than his discharge) had been added to the record to be considered by the Board of Review on the rehearing. After ineffectual attempts to have these reports withdrawn, he brought this action, in the nature of mandamus, to compel such removal before the rehearing. Because of this action the rehearing has not yet been held. The trial court sustained a motion to dismiss resulting in this appeal.

The grounds, stated by the court, for the dismissal were: (1) that the action was prematurely brought before appellant had exhausted his administrative remedies; and (2) that, aside from such situation, mandamus would not lie because the matter involved was the admissibility of evidence which was within the judgment or discretion of the Board and not a purely ministerial act. The same two issues are presented here.

At oral argument, appellant was allowed time to file a reply brief and appellee to file a brief in rebuttal. For the first time, appellee, in his rebuttal brief, presents two new grounds for affirmance of the judgment. Those are (1) that appellant has had his case reviewed and the Board decision has been approved by the President and he now has no judicial remedy since the granting of a rehearing is within the discretion of the Board and not required by the statute; and (2) that the challenged procedure has been followed by the Board in over three thousand instances and, therefore, this extended administrative construction of the statute is "entitled to great weight and should not be overturned, unless clearly wrong or unless a different construction is plainly required."

Orderly consideration of the issues will be served by an initial disposition of these two "afterthought" matters. As to the first, there is nothing in this record to show that the former decision of the Board ever reached the President or indeed passed beyond the Board before the rehearing was granted—the contrary is the clear implication of the record here. True, a rehearing by the Board is not provided in the statute; however, there is nothing expressed or implied in the statute preventing the Board according a rehearing so long as the matter has not passed from its control. Such rehearing is provided for in the Regulations of the War Department

applying to such reviews and such Regulation does not violate the statute.

As to the second, a short answer would be that the record here is barren of evidence of any long continued and much used administrative practice. However, even accepting the factual basis of long administrative action (as stated in the rebuttal brief), this simply brings into play the rule that such practice should not be overturned unless a different practice is plainly required by the statute. Whether there is here such plain requirement will be determined hereinafter.

Premature Action

The contention that the action was prematurely brought is that appellant had not exhausted his administrative remedies. The supporting argument as to non-exhaustion of administrative remedies is that appellant has been accorded a rehearing; that the Board has not, as yet, considered this evidence nor held the rehearing; and that, until it does so, he has made no showing of injury—in fact, this very evidence might constitute the reason for and result in a determination in his favor by the Board on the rehearing.

For legal authority, the argument relies upon a long line of cases, of which Lichter v. United States, 334 U. S. 742, 791, is the latest expression by the Supreme Court. These announce the general rule that, where Congress has provided an administrative procedure, such procedure must be exhausted before there can be resort to the courts. An application of this rule closer to our issue is that of cases which forbid court intervention where the matter complained of is not a final determination of the administrative body but is preliminary or merely procedural.[1] However, these wise legal rules are not without exceptions necessary to preserve fundamental rights of the litigant (Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752, 773; Anniston Manufacturing Co. v. Davis, 301 U. S. 337, 343) or to prevent a violation of express statutory limitations placed by the Congress upon the powers or actions of an administrative body (Dismuke v. United States, 297 U. S. 167, 172).

The present action is directed at a procedural matter before final administrative determination. Therefore, it is premature unless within an exception. This depends upon the fact situation and the pertinent statute.

The fact situation is undisputed, being admitted by the motion to dismiss and, apparently, conceded otherwise. This fact is that

[1] Rochester Telephone Corp. v. United States, 307 U. S. 125, 130; Federal Power Comm'n v. Metropolitan Edison Co., 304 U. S. 375, 383-385; Meyers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50-51.

the Veterans' Administration reports, made after discharge of appellant, are not "service records relating to" appellant.

The Boards of Review were authorized and their powers, duties and procedure defined in section 693i of Title 38 U. S. C. A., pocket part p. 166. The pertinent part is subsection (a), which is

> "The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer, retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case."

Broadly, the statutory method required is that the Board shall hear and determine the matter and shall transmit its "proceedings and decision" to the proper Secretary (Army, Navy or Treasury), who shall lay the same "before the President for his approval or disapproval and orders in the case." Under this prescribed method for administrative action, no notice of the decision of the Board nor any opportunity to test the soundness of the decision of the Board is prescribed.

We do not suggest that it was constitutionally necessary for the Congress to provide such opportunity. The "right" here is entirely created by and dependent upon the statute and involves possible liability of the sovereign. Such character of right may be granted upon such terms as the Congress may elect. In such situa-

tions, about the only "right" of the litigant, if he is within the statute, is to have the administrative procedure confined to the requirements of the statute. That is what appellant is trying to do in this action. From what has been shortly before expressed, it is clear that the statutory administrative method affords no opportunity, after decision by the Board, for appellant to confine the Board to the statutory procedure. On the other hand, the statute does not prohibit the intervention of the courts to compel compliance with the statute by the Board. There is no suggestion that the rights of appellant can be protected by some later and other remedy than intervention by a court into the administrative proceeding, such as suggested in Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752, 774. Nor can the courts alter a determination by the President. Therefore, any court intervention, to be effective, must be before a decision by the Board or, at least, must be initiated before such decision (compare Aircraft & Diesel Corp v. Hirsch, 331 U. S. 752, 755 note 39, and Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607, 621-622). In this situation, we conclude that judicial intervention is here permissible and that a proper action to protect the rights of appellant is not premature (United States *ex rel.* v. Interstate Commerce Commission, 252 U. S. 179). Whether this action was the proper one is the second issue before us.

Mandamus

Appellee challenges that this action—in the nature of mandamus—is not proper here because the act to be required thereby is not purely ministerial. The hornbook rule has been recently well stated by this court (Hammond v. Hull, 131 F. (2d) 23, 25) as follows: "The writ [mandamus] should be used only when the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory. . . ."

The fact situation is undisputed that the Veterans' Administration reports here are not "service records" within the meaning of section 693i. The contest is over the powers given the Board by this section.

Appellant contends that the section requires a review to be confined to consideration of his service records and such other evidence as he may present. This is grounded on the language of the section: "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

Appellee contends that this language is not exclusive but is merely "descriptive" and that inclusion or exclusion of the reports involves an exercise of discretion and judgment. It is urged that this position is established by the further language of the section and by the powers of the Retiring Board to which the lan-

guage refers. This part of the section is: "In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed." The Retiring Board pertinent provision is Title 10 U. S. C. A. § 963, which is: "*Inquiry into and determination of facts.* A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose."

Each of the parties has stated a contention which, if true, would rule this issue his way. The crux is whether the language of the section relied on by appellee modifies or affects that relied on by appellant. If this presented a doubtful situation where the language urged by appellant did not plainly carry and require the meaning he asserts, we would hesitate to uphold this remedy (United State *ex rel.* v. Interstate Commerce Commission, 294 U. S. 50, 61; Interstate Commerce Commission v. New York, N. H. & H. R. Co., 287 U. S. 178, 203-204). However, the requirement of the section is clear and unequivocal. The vital expression is that "such review *shall be based upon* . . ." (emphasis added). These words are words of exclusion of all evidence not specified in that sentence. The language urged by the appellee does not qualify this requirement. In fact, if it affected this requirement in any way, it would be to destroy it entirely. This is true because, if the Board can consider any evidence other than the service records and such as the officer might present, such action would clearly allow the Board to *base* its decision in whole or part upon this additional proof. "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. . . .' Market Co. v. Hoffman, 101 U. S. 112, 115" (*Ex parte* The Public National Bank of New York, 278 U. S. 101, 104).[2] The general language emphasized by appellee can and does cover many other matters of practice and procedure. The two statutory provisions must and can be construed so that both may be preserved. Congress never intended to destroy the plainly expressed required evidentiary basis for decision by the Board.

In principle and in fact situation, United States *ex rel.* v. Interstate Commerce Commission, 252 U. S. 178, closely parallels this case. There the action was to compel consideration of evidence, excluded by the Commission, which the statute expressly required to be considered. Also, that action was in an initial stage (United

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[2] Two recent cases in this Court are Fisher v. District of Columbia, 164 F. (2d) 707, 708 and United States v. Public Utilities Commission, 151 F. (2d) 609, 613.

States *ex rel.* v. Los Angeles & Salt Lake Railroad Co., 273 U. S. 299, 310). While this case has been confined (Interstate Commerce Commission v. N. Y., N. H. & H. R. Co., 287 U. S. 178, 204), yet it is still authority for the use of mandamus "where the departure from the statute is clear beyond debate" (Interstate Commerce Commission v. N. Y., N. H. & H. R. Co., *supra* p. 204; and see Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607, 622; United States *ex rel.* v. Interstate Commerce Commission, 294 U. S. 50, 61; Interstate Commerce Commission v. United States *ex rel.* Waste Merchants Assoc. of N. Y., 260 U. S. 32, 35). Here the ground for allowing mandamus is much stronger than in 252 U. S. 178. There, a remedy in the later stages existed which would fully protect the petitioner. Here, there is no prescribed remedy and no later opportunity to protect the statute-given rights of appellant.

Nor is this a case where final decision, if it is to be effective, should be deferred until after the decision of the Board (*Cf.* Aircraft & Diesel Equipment Co. v. Hirsch, 331 U. S. 752, 775 note 39). Here the fact situation is undisputed; the statute is clear; and the violation thereof by the Board is plain.

The judgment is reversed and the case remanded with directions to set aside the dismissal and to enter judgment requiring the Board to withdraw the Veterans' Administration reports from the record before it.

Reversed.

United States Court of Appeals
For the
District of Columbia Circuit
Filed Jun 12 1950
Joseph W. Stewart
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10351 April Term, 1950

ROBERT H. CHAMBERS, *Appellant*,

v.

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: Stephens, Chief Judge, and Prettyman and Stone, Circuit Judges.

Judgment

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with directions to proceed in conformity with the opinion of this Court.

Per Circuit Judge Stone.

Dated June 12, 1950.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT H. CHAMBERS, *Appellant*,

v.

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Appellee*.

No. 10351

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition for a writ of certiorari to the Supreme Court of the United States in the above-entitled cause, and include therein the following:

1. Joint Appendix
2. Minute entry of argument
3. Order of substitution
4. Opinion
5. Judgment
6. This designation
7. Clerk's certificate

PHILIP B. PERLMAN,
Solicitor General
Counsel for Appellee

Certificate of Service

I hereby certify that I have this day served a copy of the above designation of record on H. Russell Bishop by mailing a copy to him at his business address, 1025 Conn. Ave., N. W., Washington 6, D. C.

PHILIP B. PERLMAN,
Solicitor General

Dated: August 24, 1950.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages, numbered 1 to 30, both inclusive, constitute a true copy of the joint Appendix to the briefs of the parties, and of the pleadings and proceedings of the said Court of Appeals as designated by Counsel in the case of:

ROBERT H. CHAMBERS, *Appellant*,

v.

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Appellee*.

No. 10351—APRIL TERM, 1950, as the same remain upon the files and records of said Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this sixth day of September, A. D. 1950.

(SEAL)

JOSEPH W. STEWART
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

COLONEL HENRY S. ROBERTSON, President, Army Review Board,
Petitioner,

v.

ROBERT H. CHAMBERS, *Respondent*

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for a writ of certiorari the printed record shall consist of the following:

(a) Joint Appendix
(b) Minute entry of argument
(c) Order of substitution
(d) Opinion
(e) Judgment
(f) The designation of record
(g) Clerk's certificate

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the Supreme Court of the United States the entire transcript of record, and it is agreed that the parties hereto may refer in their briefs to said transcript of record, including any part which has not been printed.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner

H. RUSSELL BISHOP,
Counsel for Respondent

Dated: September 5, 1950.

☆ U.S. GOVERNMENT PRINTING OFFICE 1950—905212/P.O. 133

Supreme Court of the United States

No. 295, October Term, 1950

Order allowing certiorari

Filed November 27, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

916610—50 U. S. GOVERNMENT PRINTING OFFICE: 1950

No. 295

IN THE

Supreme Court of the United States

October Term, 1950

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Petitioner*

v.

ROBERT H. CHAMBERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE

Supreme Court of the United States

October Term, 1950

No. 295

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Petitioner*

v.

ROBERT H. CHAMBERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Solicitor General, on behalf of Colonel Henry S. Robertson, President, Army Review Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on June 12, 1950.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 19) is not re-

ported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 22-28) is reported at 183 F. 2d 144.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1950 (R. 29). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTION PRESENTED

The Army Disability Review Board, in reviewing *de novo* an officer's discharge for physical disability without pay, deemed it necessary to consider certain post-discharge Veterans' Administration medical examination reports on that officer.

The question presented is whether a court may, by mandamus, prohibit the Review Board from considering the Veterans' Administration reports, even though the officer and his counsel were given full opportunity to examine the reports, and to present to the Board evidence and testimony for the purpose of rebutting the contents of those reports.

STATUTES INVOLVED

Section 302 (a) and (b) of the Servicemen's Readjustment Act of 1944, as amended, 58 Stat. 287, 59 Stat. 623 (38 U. S. C. 693i (a) and (b)), which authorized the creation of the Army Disability

Review Board and defined its duties and powers, provide as follows:

> (a) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Sec-

retary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after [June 22, 1944], whichever is the later.

The powers of "the board whose findings and decision are being reviewed"—the Army Retiring Board—are provided in R. S. 1248, 10 U. S. C. 963:

A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose.

STATEMENT

On October 2, 1942, respondent Robert H. Chambers, then an Army captain, was honorably discharged, for disability and without retirement pay, as the result of the decision of an Army Retiring Board (R. 4.) After the passage of Section 302 of the Servicemen's Readjustment Act of 1944, *supra*, pp. 3-4, respondent applied to the Army Disability Review Board for review of his discharge without pay (R. 4). The Review Board held a hearing at which the "record presented to

the Board was in accordance with the terms of" Section 302 (R. 4), and, on June 11, 1945, the Review Board reversed in part and affirmed in part the findings of the Retiring Board (R. 4).[1]

Respondent's request for a rehearing was later granted by the Review Board on May 19, 1947. He was also notified, 30 days in advance, that the rehearing would take place on October 10, 1947 (R. 4). Prior to that date and "for the purpose of reviewing the record and preparing for the rehearing," respondent and his counsel were afforded access to the entire record to be considered by the Review Board at the rehearing (R. 4). Upon examining this record, they ascertained that it contained certain Veterans' Administration reports on medical examinations of respondent in 1944 (R. 5, 8). Respondent requested the Board to remove those medical reports from the record, contending that Section 302 precluded the Review Board from considering any evidence other than his "service records" and such evidence as he may wish to submit (R. 8, 9). This request was denied because the broad powers vested in the Review Board by Section 302 were viewed as authorizing it to consider evidence obtained by it, on its own motion, from the Veterans' Administration

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[1]The record does not disclose the nature of this partial reversal and affirmance. However, in view of the respondent's subsequent petition to the Review Board for a reconsideration and rehearing of his application for review, it is evident that the Review Board's affirmance included an affirmance of the prior determination discharging respondent without pay.

(R. 10). The rehearing was accordingly rescheduled for April 6, 1948 (R. 5).

On March 29, 1948, a week before the rescheduled rehearing, respondent brought this suit in the District Court of the United States for the District of Columbia, against the President of the Review Board, seeking a mandatory injunction directing that official to exclude the Veterans' Administration medical reports from the record and "to restrict such record to [respondent's] service records and documents submitted by [respondent] as evidence" (R. 2-6). Because of this action, the Board has not yet held the rehearing (R. 23).

The complaint, together with its exhibits, set forth the facts as stated above. The case was argued on a motion to dismiss (R. 17-18). The district court, sustaining the motion, ordered the complaint dismissed on the grounds (1) that mandamus would not lie to control the admissibility of evidence by an administrative board and (2) that the action was brought before respondent exhausted his administrative remedy (R. 19).

On appeal, the court below reversed, holding, in accordance with respondent's complaint, that Section 302 prohibits Review Board consideration of the Veterans' Administration reports (R. 27). The court also ruled that the suit was not dependent upon completion of the Review Board's rehearing (R. 24-26). It accordingly directed the district court "to enter judgment requiring the

Board to withdraw the Veterans' Administration reports from the record before it" (R. 28).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals, by depriving Disability Review Boards[2] of the power to consider Veterans' Administration medical reports, not only places in jeopardy the decisions rendered by those Boards since their creation under Section 302 of the Servicemen's Readjustment Act of 1944, but also compels the Boards, in reviewing future cases, to shut their eyes to official records indispensable to intelligent review. It reaches that result by overlooking the plain purpose and meaning of Section 302; by ignoring the fact that full opportunity is afforded claimants to rebut, explain, or qualify the contents of the Veterans' Adminis-

[2] It is significant that the instant decision, while involving the Army Disability Review Board, would, if left unreversed, also affect the similar boards constituted by the other services under Section 302, *e.g.*, the Navy Retiring Review Board, 32 C.F.R. 722.1, and the Air Force Disability Review Board, 32 C.F.R. 881.30. In addition, the decision would also limit the powers of the three important service boards established for the purpose of reviewing discharges of officers and enlisted men under Section 301 of the 1944 Act, 38 U. S. C. 693h. See 32 C. F. R. 581.2 (Army), 32 C. F. R. 724.1 (Navy), 32 C. F. R. 881.16 (Air Force). Section 301 contains language almost identical to that of the provision of Section 302 construed by the court below in the instant case.

The number of cases decided by the Army Disability Review Board, in accordance with its present procedure which contemplates use of Veterans' Administration reports whenever available, is shown below at p. 14.

tration reports; and by disregarding the consistent administrative construction of Section 302. Moreover, the decision below fails to give proper effect to decisions of this Court governing the scope of control by mandamus of the actions of executive officers, and is in conflict with the decisions of this Court requiring the exhaustion of administrative remedies before resort to judicial relief.

1. THE POWER OF REVIEW BOARDS TO CONSIDER VETERANS' ADMINISTRATION MEDICAL REPORTS. a. *The purpose and meaning of the statute.* Section 302's direction to the services to establish Review Boards is accompanied by a clear statement of the Boards' statutory function, *i.e.*, to review, upon request, the findings and decisions of Retiring Boards discharging officers "without pay, for physical disability." To determine whether the Retiring Board's decision should be affirmed or reversed, it is obvious that the Review Board must ascertain the true nature and extent of an officer's disability. Such an inquiry into the medical aspects of the case necessarily requires consideration of medical evidence of the character here involved, which throws light on the true physical and mental condition of the officer.

The fact that medical evidence, such as the Veterans' Administration reports in the instant case, became available only after action by the original Retiring Board and the officer's subsequent discharge, does not make that evidence any less ma-

terial to the Review Board's *de novo* review. Such evidence may show that a disability thought by the Retiring Board to be functional and slight was in fact organic and serious. On the other hand, it may show that the Retiring Board mistakenly considered a slight disability to be serious. Likewise, it may show that a disability which the Retiring Board viewed as temporary was in fact temporary, or that the Retiring Board was mistaken and that the disability was actually permanent. Indeed, the best possible evidence as to the permanency of a disability, a question on which the Review Board is compelled to rule in every case, is evidence as to whether the disability has continued or proven permanent since discharge. Whenever permanency of disability as of a particular date is in issue, it is settled that evidence or proof of subsequent events is germane and admissible. *Lumbra* v. *United States,* 290 U. S. 551; *United States* v. *Spaulding,* 293 U. S. 498, rehearing denied, 294 U. S. 731. Fairness of decision demands that the evidence be fully available to the Review Board, whether it favors the retired officer or the Government.

Full recognition by Congress of the broad nature of the Review Board's inquiry is evidenced by the commensurately broad powers conferred on the Review Boards by Section 302. The statute gives the Review Boards "the same powers as exercised by, or vested in, the board whose findings and deci-

sion are being reviewed"—the Retiring Boards. Among the powers of the latter Boards is the specific authority to "inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and [to exercise] such powers of a court-martial and of a court of inquiry as may be necessary for that purpose" (R. S. 1248, 10 U. S. C. 963). *Supra,* p. 4. Clearly, these powers include the power to compel production of any books, records, and papers material to the physical and mental condition of the officer requesting a Review Board determination. See J. A. G. opinion 1947/8124, Oct. 10, 1947. By the same token, where, as here, the Veterans' Administration medical examination reports were made available voluntarily to the Review Board, its broad powers authorized it to take the reports into consideration. Any other reading makes purposeless Section 302's additional provision that witnesses shall be permitted to testify either by affidavit or personally.

Ignoring these broad powers, the court below emphasized as the only "vital expression" in Section 302, the sentence stating "review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." Viewing these words as "words of exclusion of all evidence not specified in that sentence" (R. 27),

the court ruled that the Review Board was prohibited from considering any evidence other than (1) available "service records" or (2) evidence presented by the discharged officer. The court, in other words, inserted the word "only" in the sentence, so that it read the statute as declaring that "such review shall be based *only* upon" the service records and the officer's evidence. Since the Veterans' Administration medical reports were assumed not to be service records[3] and obviously did not fall within the second category, their consideration by the Review Board would, in the opinion of the court below, violate Section 302.

But, reading the sentence against the background of the broad powers of inquiry conferred on the Review Boards to enable them to effectuate their purpose, it is obvious that the sentence simply means that the Review Board must, *at the least,* consider available service records and the officer's evidence. The sentence in no way justifies the construction that that evidence is the *only* evidence which the Board is permitted to consider. There is no reason to attribute to Congress an intention to blind the appellate Board to other highly pertinent evidence which the subordinate board, whose decision the former is reviewing, was entitled to consider, had it been available.

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[3] It is very questionable whether the assumption that the Veterans' Administration records were not "available service records" within the meaning of Section 302 is correct.

b. *Respondent's ability to examine and rebut the Veterans' Administration reports.* A party to an administrative proceeding may not ordinarily be adjudged on evidence undisclosed to him. Whenever disclosure of the evidence is not prejudicial to the public interest, he must be apprised of the evidence to be considered by the administrative body and "given an opportunity to test, explain, or refute" it. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 93; *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274; cf. *Knauff* v. *Shaughnessy*, 338 U. S. 537.

This requirement is carried over into the Review Board's Standard Operating Procedure which expressly provides that the discharged officer "and/or his counsel may inspect, at any suitable time prior to the hearing, any and all documents, files, records, or other evidence * * * which will be presented for consideration by the Review Board."[4] In order to refute, explain, or show possible inaccuracies in such evidence the officer or "counsel of his own selection" are authorized to "appear before the review board in open session" and present testimony through any witnesses they choose "either in person or by affidavit." 32 C. F. R. 581.1 (b) (2) (i).

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[4] See Army Disability Review Board SOP (June 6, 1949), Annex A, par. 15a, superseding an earlier SOP (March 8, 1945) which contained an identical provision.

That this complete opportunity to rebut was afforded respondent in the instant case with respect to the Veteran's Administration reports cannot be challenged here. Indeed, respondent's complaint acknowledges that he and his counsel were given access to the entire record "for the purpose of * * * preparing for the rehearing" (R. 4), and that the record so made available to them contained the Veterans' Administration reports in question (R. 5, 8). Under these circumstances, it is apparent that fairness to respondent does not require exclusion of the reports from consideration by the Review Board, but, rather, that their exclusion necessarily frustrates proper and intelligent review by the Board.

c. *Consistent administrative construction of Section 302(a).* Shortly after Section 302 of the Servicemen's Readjustment Act of 1944 took effect, the War Department, recognizing that intelligent review called for consideration of all available medical evidence, directed the Review Boards to consider "all available War Department and/or other records pertaining to the health and physical condition of the applicant" (WDGAP 334 S/W's Disability Rev. Bd., Oct. 21, 1944, cited in J. A. G. opinion 1947/8124, Oct. 10, 1947). Since that time, the Army has followed that directive consistently and the current recodification of Army regulations contains identical instructions. 32 C. F. R. 581.1

(a) (2) (iii).[5] Under those regulations, the Army Disability Review Board, as of July 28, 1950, had decided 3,261 cases. Veterans' Administration examination reports were assembled and considered in these cases whenever available. In many of the cases in which the Review Board authorized retirement pay benefits, the Veterans' Administration reports constituted the basis for favorable action. They have likewise played an imporant part in many of the disallowed cases.

The rule is well-settled that consistent administrative construction of a statute, controlling the settlement of many cases, is entitled to great weight and "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States* v. *Citizens Loan & Trust Co.*, 316 U. S. 209, 214; *United States* v. *Jackson*, 280 U. S. 183, 193. We have already shown that, at the very least, there is a thoroughly reasonable basis for the administrative construction placed on Section 302 (a). Hence, since that construction is not clearly wrong, the court below erred in setting it aside.

2. MANDAMUS DOES NOT LIE TO COMPEL EXCLUSION OF THE VETERANS' ADMINISTRATION REPORTS. The court of appeals' holding does violence to the firmly-established rule that decisions of adminis-

[5] Similar instructions govern operation of the Air Force Disability Review Board, 32 C. F. R. 881.32 (c), and the Naval Retiring Review Board, 32 C. F. R. 722.3 (g).

trative officers involving the exercise of discretion and judgment, and in so far as they are not unreasonable or plainly wrong, will not be set aside by process in the nature of mandamus. *Wilbur* v. *United States ex rel. Kadric*, 281 U. S. 206; *Denby* v. *Berry*, 263 U. S. 29; *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540; *Keim* v. *United States*, 177 U. S. 290, 292; *Hammond* v. *Hull, et al.*, 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U. S. 777; *United States ex rel. Roughton* v. *Ickes*, 101 F. 2d 248 (C. A. D. C.). And "where the duty * * * depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States*, 281 U. S. 206, 219; see *Decatur* v. *Paulding*, 14 Pet. 497, 515; *Hall* v. *Payne*, 254 U. S. 343, 347-348; *Ness* v. *Fisher*, 223 U. S. 683, 691-692; *Work* v. *Rives*, 267 U. S. 175, 177-178. These rules have been uniformly applied with particular force to matters pertaining to the military establishment, the courts declining to intervene to review or set aside discretionary acts under statutes administered by the War and Navy Departments. *Denby* v. *Berry*, *supra*; *Reaves* v. *Ainsworth*, 219 U. S. 296; *French* v. *Weeks*, 259 U. S. 326; *Creary* v. *Weeks*, 259 U. S. 336.

Certainly, it would appear that the kind and quantity of the medical evidence which the Board

may consider in the discharge of its statutory duty is a matter addressed to its sound discretion and judgment, and not subject to control by mandamus. It cannot be said that the statute's mandate is so plainly in respondent's favor that there is no place for reasonable disagreement. "Where there is discretion, * * * even though its conclusion be disputable, it is impregnable to mandamus." *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555.

3. RESPONDENT FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES. The decision of the court of appeals is also believed to be in error because of the failure to apply the well-settled rule that there must be an exhaustion of administrative remedies before recourse may be had to the courts. *Myers, et al.* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley* v. *Waterson S. S. Corp.*, 327 U. S. 540, 543, 545; *Federal Power Commission* v. *Arkansas Power Co.*, 330 U. S. 802; *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375; *S. E. C.* v. *Otis and Co.*, 338 U. S. 843.

The respondent has been accorded a hearing by the Board, as a result of which the findings of the Retiring Board were affirmed in part and reversed in part. The rehearing which the Board later granted has never been held because, although scheduled on three occasions, it has been postponed twice upon the respondent's request, and a third time because of this suit. The reports in question have never been considered by the Board or any ac-

tion taken thereon, and, until the Board has acted and denied the claim, there is no showing by the respondent of any injury. Only by resorting to speculation and conjecture may an adverse decision be anticipated. For aught that appears, these additional documents may constitute the very evidence needed by the Board on rehearing to reverse completely the findings of the Retiring Board and grant respondent full retirement privileges and any other benefits which may accrue from such changed findings—in which event he would have no cause to complain. This is the very situation contemplated by the exhaustion rule and the reason for its establishment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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No. 295

In the Supreme Court of the United States

OCTOBER TERM, 1950

COLONEL HENRY S. ROBERTSON, PRESIDENT, ARMY REVIEW BOARD, PETITIONER

v.

ROBERT H. CHAMBERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 19) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 22-28) is reported at 183 F. 2d 144.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1950 (R. 29). The petition for a writ of certiorari was filed on September 8, 1950 and granted on November 27, 1950. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The Army Disability Review Board, in reviewing *de novo* an officer's discharge for physical

disability without pay, deemed it necessary to consider certain post-discharge Veterans' Administration medical examination reports on that officer.

The ultimate question is whether a court may prohibit the Review Board from considering the Veterans' Administration reports, even though the officer was given full opportunity to examine them. The subsidiary questions are whether (a) Section 302 of the Servicemen's Readjustment Act prohibits consideration of such reports, (b) mandamus is properly issuable, and (c) respondent has exhausted his administrative remedy.

STATUTES INVOLVED

1. Sections 302(a) and (b) of the Servicemen's Readjustment Act of 1944, 58 Stat. 287, as amended, 59 Stat. 623 (38 U. S. C. 693i (a) and (b)), which authorized the creation of the Army Disability Review Board and defined its duties and powers, provide as follows:

> (a) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board,

board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after [June 22, 1944], whichever is the later.

2. The powers of the Army Retiring Board, "the board whose findings and decision are being reviewed" in this case, and which are specifically vested in the Army Disability Review Board by

Section 302(a), *supra*, are set forth in R. S. 1248 (10 U. S. C. 963):

> A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose.

STATEMENT

On October 2, 1942, respondent Robert H. Chambers, then an Army captain, was honorably discharged, for physical disability and without retirement pay, as the result of the decision of an Army Retiring Board (R. 4). After the passage of Section 302 of the Servicemen's Readjustment Act of 1944, *supra*, pp. 2-3, respondent applied to the Army Disability Review Board for review of his discharge without pay (R. 4). The Review Board held a hearing at which, as respondent has frankly conceded, the "record presented to the Board was in accordance with the terms" of Section 302 (R. 4). On June 11, 1945, the Review Board reversed in part and affirmed in part the findings of the Retiring Board (R. 4).[1]

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[1] The record does not disclose the nature of this partial reversal and affirmance. However, in view of the respondent's subsequent petition to the Review Board for a reconsideration and rehearing of his application for review, it is evident that the Review Board's affirmance included an affirmance of the Retiring Board's determination that respondent was incapacitated for active military service but that his inca-

Respondent's request for a rehearing was granted by the Review Board on May 19, 1947 (R. 4). He was also notified, 30 days in advance, that the rehearing would take place on October 10, 1947 (R. 4). Prior to that date and "for the purpose of reviewing the record and preparing for the rehearing," respondent and his counsel "went to the Pentagon to the offices of the Army Disability Review Board" where they were afforded access to the entire record to be considered by the Review Board at the rehearing (R. 4). Upon examining this record, they ascertained that it contained certain Veterans' Administration reports on medical examinations of respondent in 1944 (R. 5, 8).[2] Respondent requested the Board

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pacity was not the result of an incident of service. In these circumstances, respondent, unlike an officer whose incapacity resulted from his service, is not placed on the retired list and is not entitled to retirement pay, which has normally been 75% of the pay of the rank held upon retirement. See R. S. 1251, 1252, 1274; 10 U.S.C. 933, 934, 971. The Career Compensation Act, which established a new retirement system for members of the armed forces effective October 1, 1949, also allows retirement pay only for service-incurred incapacity. (37 U.S.C., Supp. III, 271-284).

For general discussions of retirement pay, see Fitzgibbons, *Disability Benefits for Discharged Soldiers—Law, Regulation and Procedure* (1945), 31 Iowa L. Rev. 1, 22-35, and Kimbrough and Glen, *American Law of Veterans* (1946), ch. XIV (and 1949 Supplement).

[2] These reports had evidently not been brought to the Review Board's attention during its initial consideration of respondent's appeal from the decision of the Retiring Board. They were apparently "added to his file" prior to the scheduled rehearing (R. 8).

to remove those medical reports from the record, contending that Section 302 precluded the Review Board from considering any evidence other than his "service records" and such evidence as he may wish to submit (R. 8, 9). This request was denied because the broad powers vested in the Review Board by Section 302 were viewed as authorizing it to consider evidence obtained by it, on its own motion, from the Veterans' Administration (R. 10). The rehearing was twice delayed at respondent's request and finally rescheduled for April 6, 1948 (R. 5).

On March 29, 1948, a week before the rescheduled rehearing, respondent instituted this mandamus proceeding (R. 2) in the District Court of the United States for the District of Columbia, against the President of the Review Board, petitioner herein,[3] seeking a mandatory injunction directing that official to exclude the Veterans' Administration medical reports from the record and "to restrict such record to [respondent's] service records and documents submitted by [respondent] as evidence" (R. 2-6). Because of this action, the Board has not yet held the rehearing (R. 23).

[3] Suit was originally filed against Brigadier General Danforth in "his official capacity" as President of the Army Review Board (R. 2). On April 3, 1950, Colonel Robertson, the petitioner herein and the present President of the Board, was substituted on respondent's motion in the court of appeals (R. 21-22).

The complaint, together with its exhibits, set forth the facts as stated above. Petitioner moved to dismiss, and the case was heard and argued on this motion (R. 17-18). The district court, sustaining the motion, ordered the complaint dismissed on the grounds (1) that mandamus would not lie to control the admissibility of evidence by an administrative board and (2) that the action was brought before respondent exhausted his administrative remedy (R. 19).

On appeal, the court of appeals reversed, holding, in accordance with respondent's complaint, that Section 302 prohibits Review Board consideration of the Veterans' Administration reports (R. 27). The court also ruled that the suit was not dependent upon completion of the Review Board's rehearing (R. 24-26). It accordingly directed the district court "to enter judgment requiring the Board to withdraw the Veterans' Administration reports from the record before it" (R. 28).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that the Army Disability Review Board did not have the power, under Section 302 of the Servicemen's Readjustment Act, to add Veterans' Administration reports, made after respondent's discharge from military service, to the record to be considered by the Board.

2. In holding that process in the nature of mandamus would lie to compel the Board to ex-

clude Veterans' Administration records from the record before the Board.

3. In holding that respondent had exhausted his administrative remedy and the action was not premature.

4. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

The court of appeals and respondent rest their view that a Disability Review Board, reviewing the decision of a retiring board under Section 302 of the Servicemen's Readjustment Act of 1944, *supra*, pp. 2-3, cannot consider post-discharge Veterans' Administration medical reports, almost wholly on one sentence of that section: "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." That this sentence does not proscribe the disputed reports is shown by its terms and the terms of the whole section, by the section's legislative history, and by the consistent administrative practice since the statute's enactment.[3]

A. Even if the critical sentence be held to delimit the types of evidence which the review board may consider, the Veterans' Administration re-

[3] It is admitted that respondent and his counsel have been given full access to the medical reports in question (R. 4-5).

ports are included. For "all available service records" is equivalent to "all available records of the service department" relating to the individual, and Veterans' Administration reports, which have been officially transmitted to, and included in, the Army Department's files, have become "available records" of the latter agency, in the normal meaning of those words.

Properly read, however, the sentence attempts not to restrict the evidence which the Review Board *may* consider, but only to prescribe the minimum which it *must* take into account. Even apart from the rest of Section 302, it is textually permissible to construe "shall be based upon" as "shall start or commence from," so that the sentence's requirement would simply be that the board's rehearing or reconsideration was to start or commence from "all available service records" (however that term be interpreted), plus the evidence proffered by the applicant.

This is, indeed, the reading compelled by the remainder of Section 302, which plainly indicates that the review board is to make a *de novo* determination of disability-incident-to-service, as a result of a consideration of all available pertinent evidence. In particular, the section expressly endows the review board with all the powers of the boards whose decisions it reviews—the retiring boards. Retiring boards have long had broad powers to "inquire into and determine the facts touching the nature and occasion of the disability," including

the powers of a court-martial and a court of inquiry. (R. S. 1248, *supra,* p. 4.) These powers have traditionally been exercised to investigate into all relevant data and to secure full disclosure of the pertinent facts. Congress plainly intended the review board to have at least as broad powers of inquiry as the boards whose decisions it is regularly called upon to revise or confirm.

Moreover, post-discharge or post-retirement evidence is decidedly germane to the issue of permanence of disability, a question upon which review boards must rule in every case before ordering retirement with pay. In this connection, the extremely long statute of limitations contained in Section 302, permitting review fifteen or more years after retirement or discharge, is significant. Where any substantial time has elapsed since discharge or retirement, no intelligent decision can be made on the issue of permanence of disability without consideration of the applicant's subsequent medical history. It is undisputed that the officer is free to introduce such evidence if it is favorable to his claim, and there is no reason why like evidence should arbitrarily be barred where it is unfavorable.

B. The history of Section 302, which was a part of the "G. I. Bill of Rights," confirms this conclusion. The companion Section 301, establishing general discharge review boards to review the nature and type of all kinds of discharges, contains a provision substantially identical to the sentence in

Section 302 on which the court below relies, and, yet, the legislative history clearly shows that these boards, far from being confined to technical "service records" and the veteran's evidence, were to obtain as complete a picture as possible of all the true facts and circumstances. The history also demonstrates that Section 302 disability review boards, here involved, are twins of the Section 301 boards, and were intended to have comparable powers and duties of inquiry and investigation.

C. The consistent administrative interpretation by the service departments has been in accord, since shortly after the statute was passed. Congress, which has amended Section 302 in other respects, appears to have acquiesced in this construction.

II

Even if Section 302 be construed to prevent the review board from initially considering Veterans' Administration reports, that limitation should not be applied to a review board rehearing of its own adverse decision, since such a rehearing is a matter of administrative grace. In the present case, it is admitted that on the hearing required by the statute the disputed reports were not considered, and it is only in connection with the discretionary rehearing that they are to be included in the file.

III

Since the review board's construction of the statute is, at the very least, a reasonable one, the

established rules governing mandamus, particularly as to military matters, bar that remedy here. *Wilbur* v. *United States,* 281 U.S. 206, 219. These traditional rules have not been changed by the Administrative Procedure Act.

IV

Respondent brought this suit before the rehearing which he sought had been held. He has, therefore, not exhausted his administrative remedy, and judicial intervention is premature, regardless of whether or not he might ultimately obtain review of a final adverse decision on its merits.

ARGUMENT

Section 302(a) of the Servicemen's Readjustment Act of June 22, 1944, (the "G. I. Bill of Rights"), directs the armed services to establish Boards of Review and empowers those Boards to review decisions of retiring boards which have released officers for physical disability without pay. If a retiring board has decided that an officer is incapacitated for military duty and that his incapacity for military duty was not the result of an incident of his military service—circumstances which warrant retirement for physical disability without retirement pay [4]—the officer affected by the retiring board's decision is entitled to administrative review by a Section 302 Review Board. *Supra,* pp. 2-3.

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[4] See footnote 1, *supra,* pp. 4-5.

Respondent Chambers sought such a review of a retiring board's decision releasing him from service, in 1942, for physical disability without pay, but he contends in this suit that the record before the Review Board may not contain Veterans' Administration reports on medical examinations given him after his discharge, even though he has examined the reports and was offered full opportunity to rebut their contents. He does not contend that these reports are not pertinent or are irrelevant in the evidentiary sense. His exclusive reliance is Section 302's provision that "review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer," *supra*, p. 3, which he reads as flatly barring these reports, regardless of their evidentiary value.

The principal question for decision is whether this language in Section 302 prohibits the Review Board from considering the post-discharge Veterans' Administration medical reports concerning the officer invoking its review authority. It is our position that that portion of Section 302(a) cannot be stretched so as to justify such a prohibition. To the contrary, we believe that the full wording of the section—taken together with its purpose, its legislative history, and the functions vested in the Review Board—require the conclusion that Congress never intended to force the Board to blind

itself to Veterans' Administration reports or other material evidence.

Even if any other conclusion is permissible, this question of statutory interpretation, not being free from doubt, calls for the exercise by the Board of the type of discretion and judgment which is not controllable by mandamus. Moreover, since the Board rehearing, in connection with which respondent seeks to exclude the Veterans' Administration reports, has not yet been held, it is apparent that he is not entitled to judicial relief for his supposed or threatened injury until the prescribed administrative remedy has been exhausted.

I

Section 302 of the Servicemen's Readjustment Act of 1944 does not prohibit Army Disability Review Boards from considering post-discharge Veterans' Administration medical reports

A. *The Terms of Section 302 Show that Veterans' Administration Reports May Properly Be Considered.*

The court of appeals premised its holding that Veterans' Administration records may not be considered by the Disability Review Board on the view that the only "vital expression" in Section 302 is the sentence stating that "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer" (R. 27). Viewing these words as "words of exclusion of all evidence not specified in that sentence"

(R. 27), the court ruled that the Review Board was prohibited from considering any evidence other than (1) available "service records" or (2) evidence presented by the discharge officer. Since the Veterans' Administration medical reports were assumed not to be service records, and obviously did not fall within the second category, their consideration by the Review Board would, in the opinion of the court, have violated Section 302. The same argument is made by respondent (Br. in Opp., pp. 5-8).

1. It may be noted initially that the assumption that the Veterans' Administration records were not "service records", within the meaning of Section 302, is very questionable.[5] The term "service

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[5] In the court below, the Government did not argue that the reports were included within the term "service records", and may have conceded that they were not (R. 24-5). Nevertheless, we make the contention in this Court, if it is open to us to do so, because, in addition to this particular case, the decision here will probably govern all future proceedings of Disability Review Boards and probably also of the general Discharge Review Boards (operating under the companion Section 301). Cf. *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 281, 289.

Despite an intimation in the court of appeals' opinion (R. 24-5), the fact that this case is to be determined on a motion to dismiss is no obstacle to the presentation of this argument. The Government's motion did not admit the legal conclusion in the complaint (and its exhibits) that the Veterans' Administration medical reports were not "service records", within the meaning of Section 302. Cf. *Nortz* v. *United States*, 294 U.S. 317, 324-5; *Newport News Co.* v. *Schauffler*, 303 U.S. 54, 57.

records" includes all records of the particular service department to which the retired officer belonged and which concern him. This is made clear by the language used in the preceding Section 301 of the Act, which created the general Discharge Review Boards (established to review discharges of all types, see *infra,* pp. 27-36). Instead of simply using the term "service records," Section 301 spells out the thought intended to be conveyed by that term by referring to "all available records of the service department relating to the person requesting such review" (58 Stat. 286, 38 U.S.C. 693h). *Infra,* p. 28. Although the language is somewhat different, there is no reason to believe that a difference in meaning was intended, and the history of Sections 301 and 302, discussed below (at pp. 27 *et seq.*), confirms the equivalence of the two expressions.

Of course, the Veterans' Administration medical reports here involved were compiled by officials and employees of the Veterans' Administration. But once such official government reports were transmitted to the Army and incorporated into that Department's files, it would be hard to deny that they became official records of the Army Department (as well as of the Veterans Administration), and hence "service records" within the meaning of Section 302. [6]

[6] Since "service records" include all records of the service department to which the retired officer belonged and which concern him, they necessarily include all such records whether

2. In any event, if the term "service records" is not broad enough to include Veterans' Administration reports, we submit that reading the sentence relied on by the court below in the context of the whole of Section 302 shows that it simply means that the Review Board must, at the least, consider available "service records" and the officer's evidence. It does not mean that that evidence is the *only* evidence which the Board may consider.

a. Even if it is read literally and in isolation from the rest of the section, the sentence which the court of appeals finds critical [7] does not "plainly carry and require the meaning" the court finds there (R. 27). The sentence obviously speaks of "review" in the sense of "reconsideration" or "rehearing", and the succeeding phrase, "shall be based upon", may quite properly be construed—to use one of the common dictionary meanings of "base"—as "shall commence or start from". In other words, the Disability Board's reconsider-

compiled before or after the officer's discharge. A particular record does not fall out of the class of "all available records of the service department" "relating to" the officer requesting the review because it was made or received after he had left the service. There is therefore no merit to respondent's textual contention that "service records" must refer only to pre-discharge records (Brief in Opp., p. 8). Moreover, the fact that the officer can compel the Board to consider post-discharge data in his favor tends to show that the Board is not limited to pre-discharge "service records". See *infra*, pp. 24-25.

[7] "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

ation of the retiring board's decision is to *start* from, or *commence* with, the available "service records" and the evidence presented by the officer, but it is not necessarily to end or conclude there; other evidence may be considered if appropriate or desirable. "Service records" and the officer's evidence form the minimum materials to be considered, but not the maximum.

This reading of the bare words "shall be based upon" as "shall start or commence from"—rather than as "shall be founded upon", in the way the court below does (R. 27)—is certainly a permissible one, at the least; it is textually confirmed by the fact that the statute says that the Board's *"review"*, and not the Board's *"decision"* (a term also used in Section 302), "shall be based upon" the specified evidence.

b. Once Section 302 is read as a whole, there need be no doubt that Congress fully endowed the Army Disability Review Board with authority to consider all relevant information and evidence. Full-scale, unbiased review and reconsideration is obviously contemplated. The "findings" and "decisions" of the retiring boards are to be reviewed, and their decisions may be affirmed or reversed, but the reconsideration is not confined to the evidence before the prior board. New evidence may be introduced, through witnesses or in document form, and the officer may appear. The crucial issue is whether the officer should have been retired with-

out pay, and if the reviewing board cannot ascertain all the available facts as to the extent of the officer's incapacity and whether that incapacity resulted from his military service, it cannot be expected to decide that issue intelligently.

(1) Most significant is the provision giving the Review Board "the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed"—the army retiring boards. The plenary power of a retiring board to obtain all information pertinent to its inquiry appears clearly from its authority, as well as from the procedure it has developed (under that authority) to elicit all data which might be of value in disclosing the true nature of the officer's disability and its cause. These broad powers of inquiry vested in the retiring boards undoubtedly give them access to Veterans Administration's reports or other medical data.

To enable the retiring board to determine whether an officer should be retired for disability with or without pay, it is granted express authority to "inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office." R. S. 1248, *supra*, p. 4. Whenever an officer is ordered before a retiring board, the Adjutant General is required to furnish for consideration by the board, "originals or certified copies of the complete medical history, and of

all other official records[8] affecting the health and physical condition of the officer." AR 605-250, dated March 28, 1944, par. 3a. Before the taking of any testimony, the recorder submits to the board, in open session, all papers pertaining to the case which have been received from the Adjutant General's office. *Id.* par. 23c(1). The officer appearing before the board and his counsel "have the right to inspect *all such papers* during the hearing, and, upon reasonable request, before the hearing." *Id.* par. 23c(1). At the beginning of the hearing, the officer ordered before the board is called to state under oath the nature and cause of any disability. The board and the recorder are authorized orally to "examine [the officer] at this time or later for the purpose of *making full discovery of all facts as to* his condition." *Id.* par. 21.

To facilitate this full discovery of all facts, the board is, by statute, also given "such powers of a court-martial and of a court of inquiry as may be necessary for that purpose." R. S. 1248, *supra*, p. ←4. Witnesses may thus be summoned and their attendance compelled. A. R. 605-250, par. 22. When testifying as a witness in his own behalf, the officer may be cross-examined as any other witness. He may introduce testimony of witnesses and may cross-examine witnesses examined by the board. He may also cross-examine the medical members of the board if they have taken part in his physical examination and have indicated an opinion as to

[8] All emphasis in this paragraph has been supplied.

his physical condition. *Id.* par. 22c.[9] In addition to its access to all necessary testimony, the court-martial powers vested in the retiring board means that it can compel the production of any books, records, and papers material to the physical and mental condition of the officer appearing before it. *Id.* par. 23a.[10]

Since all of these unrestricted fact-finding and investigatory powers of the retiring boards are expressly vested in Disability Review Boards by Section 302, the Review Board here was also unrestricted in its investigation. It was fully authorized by this grant of power to consider any relevant evidence or material, including the obviously relevant Veterans' Administration reports, in order to obtain a full disclosure of pertinent facts. To limit the Review Board's power to investigate and to consider all pertinent evidence is *pro tanto* to frustrate Congress' clear purpose

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[9] While evidence as to the physical condition of the officer before the retiring board will ordinarily be furnished otherwise than by the medical members of the board, such members are authorized by the regulations to make a physical examination of the officer and may testify before the board as to the result of such examination. AR. 605-250, par. 22e.

[10] As the Navy manual says of the comparable regulations governing Navy retiring boards—"The above powers and authority are given the board in order that it may determine the facts and reach a conclusion in the matter before it. The proceedings of a retiring board being in no sense a trial, the board may properly consider documents and testimony which would not be proper evidence before a court martial." *Naval Courts and Boards* (1937) sec. 959.

to give it powers at least as broad as those of the retiring boards—an aim which is shown not only by the positive directive that the reviewing tribunal is to have "the same powers as exercised by, or vested in" the retiring board, but also by the difficulty of attributing to Congress an intention to blind the appellate board to evidence of the type which the subordinate board, whose decision the former is reviewing, was entitled to consider.

(2) The extremely long statute of limitations allowed by Section 302 also attests to the inadvisability of precluding the Review Board from considering post-discharge Veterans' Administration reports or any other developments subsequent to the officer's retirement or discharge. Under Section 302(b), *supra*, p. 3, it is possible for an officer to seek review of an adverse retiring board decision within fifteen years after June 22, 1944 (the date of enactment of the Servicemen's Readjustment Act) or within fifteen years after the date of his retirement for disability, "whichever is the later." This means that regardless of how far back an officer was retired for disability he may ask for review by the Disability Review Board at any time before June 21, 1959.[11] For example, an officer

[11] The review benefits of the Section are in no way limited to veterans of World War II. The members of the House Committee on World War Veterans' Legislation stated that they wanted "to get in the [congressional] record the legislative intent on the part of the members of the committee" to the effect that the Section "covers veterans" of all other wars as well. 90 Cong. Rec. 4541.

retired in 1909, at the age of 25, could, in 1959, 50 years later, ask for review of the retiring board decision which released him from the service without pay. If the Review Board, in such a case, should determine that the retiring board decision was improper and that the officer should be placed on the retired list with pay, he might well be entitled to recover from the Government either the active service pay or the retirement pay he would have earned during that fifty-year period. See *Womer* v. *United States,* 114 C. Cl. 415, 422.

This large contingent liability to which the Government is exposed under Section 302 makes the need for full ascertainment of all the true facts even more imperative. And, very frequently, evidence available only after the officer's retirement is the best key to proper evaluation of his physical and mental condition. Where a long period of time has elapsed between retirement and review, such evidence may be the only evidence which can cast light on the officer's disability. Post-discharge or post-retirement evidence may show that a disability thought by the retiring board to be functional or slight was in fact organic and serious. On the other hand, it may show that the retiring board mistakenly considered a slight disability to be serious. Likewise, it may show that a disability which the retiring board viewed as temporary was, in fact, temporary, or that the retiring board was mistaken and that the disability was actually permanent. Indeed, the best possible evidence as to

the permanency of the disability—a question on which the Review Board is compelled to rule in every case in which retirement with pay is ordered—is evidence as to whether the disability has continued or proven permanent since the officer's discharge. Whenever permanency of disability as of a particular date is an issue, it is settled that evidence or proof of subsequent events is germane and admissible. *Lumbra* v. *United States,* 290 U.S. 551, 560; *United States* v. *Spaulding,* 293 U.S. 498, 500, rehearing denied, 294 U.S. 731. There is no doubt that Section 302 would allow respondent to introduce such evidence whenever it was favorable to him, and would also require the Review Board to consider it on the ground that it was "other evidence as may be presented by [the] officer." Section 302(a), *supra,* p. 3. Nevertheless, respondent appears to argue that if the evidence does not favor him but tends to confirm the view of the retiring board, it may not be considered by the Review Board.[12] Fairness of decision militates

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[12] Respondent is plainly wrong in the contention that the review board must "place itself as nearly as possible in the position of the retiring board whose action it is to review" (Br. in Opp., p. 8). If that had been the congressional purpose, the statute would have provided for a review solely of the evidence and information before the retiring board. But the scheme of Section 302 is to provide for a redetermination of the facts on a new or augmented record. New evidence may be offered, new witnesses heard, new documents submitted. As he all but admits (Br. in Opp., p. 8), respondent's real position is that the retired officer has full leeway to prove the original decision wrong by introducing new evidence, but

against this inconsistent position and demands that the evidence be wholly available to the Review Board, whether it favors the retired officer or the Government. There is no indication in the statute that Congress desired arbitrarily to weight the Board's reconsideration sharply on the officer's side, and no other reason can be given for handicapping the Government as severely as the court below has done.

3. One additional and extremely important factor should be noted. This is not a case where respondent seeks to exclude Review Board consideration of the Veterans' Administration reports on the ground that he has had no opportunity to examine or rebut the contents of those reports. Considerations of fairness often require that a party to an administrative proceeding be not adjudged on evidence undisclosed to him. A party to such a proceeding is usually fully apprised of the evidence submitted to, or to be considered by, the administrative agency, and given an opportunity to inspect documents and to offer evidence in explanation or rebuttal — whenever disclosure of the evidence to be considered by the administrative board is not prejudicial to the public interest. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U.S. 88, 93; *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274; *cf. Knauff* v. *Shaughnessy*, 338 U.S. 537.

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the Government is confined to upholding the decision on the retiring board's own record.

Whether or not these principles would necessarily govern a grant or review of what are really pension benefits, they are carried over into the Review Board's Standard Operating Procedure [13] which specifically provides that the discharged officer "and/or his counsel may inspect, at any suitable time prior to the hearing, any and all documents, files, records, or other evidence * * * which will be presented for consideration by the Review Board." [14] In order to refute, explain, or show possible inaccuracies in such evidence, the officer or "counsel of his own selection" are authorized to "appear before the review board in open session" and present testimony through any witnesses they choose "either in person or by affidavit." 32 CFR 581.1(b)(2)(i).

In view of these provisions, it is undeniable that complete opportunity was afforded the respondent to rebut the Veterans' Administration reports he sought to exclude from consideration. And respondent's complaint acknowledges that he and his counsel were given access to the entire record at the Pentagon Building "for the purpose of * * * preparing for the rehearing" (R. 4), and that the records so made available to them contained the

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[13] The same right of inspection and examination is also available, as has been noted, *supra*, p. 20, before the retiring board.

[14] See Army Disability Review Board SOP June 6, 1949 Annex A, Paragraph 15(a), superseding an earlier SOP, March 8, 1945, which contained an identical provision.

Veterans' Administration reports here challenged (R. 5, 8). In these circumstances, it is apparent that fairness to respondent does not require exclusion of the reports from consideration by the Review Board, but rather that their exclusion results in hampering proper and intelligent review.

B. *The History of Section 302 Confirms this Conclusion*

The history of Section 302, far from evincing any congressional intent to deny Review Boards access to Veterans' Administration, or similar, reports, discloses full congressional awareness of the need for empowering the Boards to consider all pertinent evidence. There is no indication of a design to restrict the reviewing tribunal's consideration to (a) materials already included in the service's files, plus (b) such evidence as the veteran might be willing to offer.

In tracing the development of Section 302,[15] the relevant history is largely that of its companion provision, Section 301, which authorized the creation of Discharge Review Boards to review the "type and nature" of any discharge or dismissal from the service, except one resulting from a gen-

[15] While other Titles of the Servicemen's Readjustment Act of 1944 ("G. I. Bill of Rights") conferred educational benefits, loan guarantee privileges, and unemployment pay benefits on ex-servicemen generally, Title I, in which Section 302 was included, was mainly focussed on assisting the disabled or disqualified veteran. 90 Cong. Rec. 4453, 4456.

eral court-martial sentence.[16] The history of Section 301 is directly pertinent for two important

[16] Section 301, 58 Stat. 286, as amended in 1946, 60 Stat. 932, 38 U.S.C. 693h, provides:

> The Secretary of War and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the War and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man or woman or, if deceased, by the surviving spouse, next of kin, or legal representative, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel: *Provided*, That the term "counsel" as used in this section shall be construed to include, among others, accredited representatives of veterans' organizations recognized by the Veterans' Administration under section 200 of the Act of June 29, 1936 (Public Law Numbered 844, Seventy-fourth Congress). Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are hereby amended to authorize the Secretary of War and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of War or the Secretary of the Navy, respectively: *Provided*,

reasons. First, as we have already pointed out (*supra*, pp. 15-16), Section 301 contains language almost identical to the sentence in Section 302 on which respondent relies.[17] In addition, as we show below, Section 302 was inserted at the last stage of legislative consideration merely in order to accede to demands for express and separate recognition of the claims of disabled officers retired without pay; in the earlier phases of the legislative process, Section 301 was deemed broad enough to

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That no request for review by such board of a discharge or dismissal under the provisions of this section shall be valid unless filed within fifteen years after such discharge or dismissal or within fifteen years after the effective date of this Act [June 22, 1944] whichever be the later: *And provided further*, That the authority conferred upon the Secretary of War and the Secretary of the Navy by this section shall vest in and be exercised by the Secretary of the Treasury, at such times as the Coast Guard is operating under the Treasury Department, with respect to the discharge or dismissal of former personnel of the Coast Guard, and that the findings of boards established pursuant to such authority shall be final subject only to review by the Secretary of the Treasury.

[The 1946 amendment added the provisions relating to the Coast Guard]

[17] As the preceding footnote indicates, Section 301 provides that review by Discharge Review Boards "shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person." 58 Stat. 286, 38 U. S. C. 693h. The comparable provision of Section 302 states that the "review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." *Supra*, p. 3.

authorize the Discharge Review Boards to reconsider decisions of retiring boards which had retired officers for physical incapacity but without pay—that is, the type of review specifically vested in the Disability Review Boards by Section 302 as enacted.

1. S. 1617, of the 78th Congress—the bill which evolved into S. 1767, which in turn became the Servicemen's Readjustment Act of 1944—was introduced on January 11, 1944, by Senator Clark, the chairman of the Subcommittee on Veterans' Legislation of the Senate Committee on Finance. 90 Cong. Rec. 30. On the House side, the companion measure, H. R. 3917, was introduced on January 10, 1944, by Representative Rankin, chairman of the Committee on World War Veterans' Legislation. 90 Cong. Rec. 24. Each of these bills contained a broadly phrased Section 301 providing for review of the "type" and "nature" of any former officer's or soldier's "discharge or release from active duty," and clearly encompassing cases involving retirement or release from active duty without pay for physical disability. Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917, p. 3.[18]

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[18] Section 301, in these bills, provided:

> SEC. 301. The Administrator of Veterans' Affairs is hereby authorized and directed to confer with the Secretary of War and the Secretary of the Navy for the purpose of establishing boards of review in the War and Navy Departments composed of five members each whose duties shall be to review, upon the request of

The debates and hearings on these measures, and their successor bills, leave no doubt as to the predominant purpose of the review of discharges, dismissals, and retirements sought to be established by this Section 301. The pressures of rapid demobilization had resulted in injustices to many soldiers through the improper issuance to them "in haste" of dishonorable or "bad conduct" or "blue" or "without honor" discharges, when honorable discharges should have been awarded. Hearings before the Subcommittee on Veterans' Legislation of the Senate Committee on Finance, 78th Cong., 2d Sess., on S. 1617, p. 83.[19] The veteran might be interested

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a former officer or enlisted man or woman, the type and nature of his or her discharge or release from active duty. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or by counsel: *Provided,* That the term "counsel" as used in this section shall be construed to include, among others, accredited representatives of veterans' organizations recognized by the Veterans' Administration under section 200 of the Act of June 29, 1936, Public Law Numbered 844, Seventy-fourth Congress. Such board shall have authority to change, correct, or modify any discharge or release from active duty in accord with the facts presented to the board.

[See Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H.R. 3917 and S. 1767, p. 3.]

[19] In general, the Army (including the Army Air Forces) issued the following types of discharges to enlisted personnel

in having such a discharge corrected only as a matter of personal pride and for purposes of removing the stigma attaching to a non-honorable discharge. But, in view of the generous and comprehensive statutory scheme of veterans' disability benefits,[20] together with the mass of federal and

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during and preceding World War II: (a) the honorable or white discharge; (b) the dishonorable or yellow discharge, issued only by sentence of a general court-martial; and (c) the discharge without honor or blue discharge, issued where service was not honest and faithful or where character was less than "good"; it is neither honorable nor dishonorable. Separations and dismissals of officers fell into the same general categories. See Sen. Doc. 152, 78th Cong., 2d Sess. ("Manual explanatory of the privileges, rights, and benefits provided for all persons who are, or have been, members of the armed forces of the United States and of those dependent upon them"), at pp. 49-51; Kimbrough and Glen, *American Law of Veterans* (1946), sec. 191, pp. 136-138; Fitzgibbons, *Disability Benefits for Discharged Soldiers—Law, Regulation and Procedure* (1945), 31 Iowa L. Rev. 1, 16-17.

The Navy and Coast Guard had the following types of discharge: (a) honorable, (b) under honorable or satisfactory conditions, and (c) unfavorable, including dishonorable (pursuant to sentence of a general court-martial), bad conduct (by sentence of a summary or general court-martial), undesirable, and unfitness discharges. The Marine Corps issued (a) honorable discharges, (b) simple discharges, including some types of discharges for undesirability, (c) bad-conduct discharges by sentence of summary or general court-martial, and (d) dishonorable discharges, pursuant to sentence of a general court-martial. See Sen. Doc. 152, *supra*, at pp. 51-3; Kimbrough and Glen, *op. cit., supra*, secs. 192-193, pp. 137-140.

[20] The statutory benefits available for compensating soldiers for disability incurred incident to service are, together with a vast number of other statutes conferring additional benefits on veterans, codified in Title 38, U.S.C. (Pensions, Bonuses, and Veterans' Relief). In addition, Title 10 (Army),

state legislation granting other substantial benefits and preferences to the ex-serviceman, [21] it was also

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Title 34 (Navy), Title 37 (Pay and allowances of Army, Navy, Marine Corps, Coast Guard) contain many other statutes on military benefits and perquisites. In addition to retirement pay, which is generally available only to officers and enlisted personnel with long service, the principal types of disability benefits are:

a. Monthly pension payments are provided by law in respect of those servicemen who have incurred partial or total disabling injuries as a result of their military service (Act of March 20, 1933, Sec. 1 (a), 48 Stat. 8, 38 U. S. C. 701 (a); Act of July 13, 1943, 57 Stat. 554; Act of October 10, 1949, Public Law 339, 81st Cong., 1st sess.). The amount of the disability pension depends, of course, on the degree of disability, and may be as high as $300 per month (Act of September 20, 1945, 59 Stat. 533, 534, amending Vet. Reg. No. 1 (a), part I, paragraph II (o)). A disability pension continues to be paid until the serviceman's death or until the disability has ceased. Where, after a pension award has been made, the disability is shown to have increased, commensurate increases in the pension will be made (Act of June 21, 1879, 21 Stat. 30, as amended, 38 U. S. C. 57). Moreover, under the Acts of July 2, 1948 and October 10, 1949, veterans with a disability of 50 percent or more are entitled to additional payments ranging from $14 to $91 every month, based on their degree of disability and the number of their dependents. (62 Stat. 1219; Public Law 339, 81st Cong., 1st sess.)

b. Veterans are also entitled to additional hospitalization and medical care from the Veterans' Administration (Act of June 7, 1924, Sec. 10, 43 Stat. 610, as amended, 38 U.S.C. 434; Act of March 20, 1933, Sec. 6, 48 Stat. 9, 38 U. S. C. 706; 10 C. F. R. Cum. Supp. 77.2 (b) and 77.15 (b)).

c. The Act of June 27, 1944 (58 Stat. 388, 5 U. S. C.

clear that the interest of the veteran in correcting an improperly-issued non-honorable discharge might well go beyond merely clearing his name. For practically all such benefits are barred to veterans dishonorably discharged by general court-martial sentence,[22] most are withheld from veterans otherwise discharged "under dishonorable conditions,"[23] and several are barred to any veteran not affirma-

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852) gives special federal employment preference to veterans with service-connected disabilities.

d. Other statutes confer special farm loan and mortgage insurance privileges on veterans with pensionable disabilities so as to afford such veterans sufficient income which, together with their pensions, will enable them to meet living and operating expenses and the amounts due on their loans (Act of August 14, 1946, 60 Stat. 1073, 7 U. S. C. 1001 (c)).

[21] *E.g.*, the benefits of Title II (Education), Titles III (Loans), IV (Employment), and V (Unemployment Readjustment Allowances) of the Servicemen's Readjustment Act itself; the Veterans' Preference Act of 1944 and comparable state civil service laws; Section 8 of the Selective Training and Service Act of 1940; state bonus laws. For a collection and description of federal statutes conferring special rights and benefits on veterans and their dependents, see Kimbrough and Glen, and Sen. Doc. 152, 78th Cong., 2d sess., *op. cit., supra*, note 19. For a complete index and digest of benefits conferred by various state statutes, see State Veterans' Laws (79th Cong., 1st sess., House Committee Print No. 8).

[22] See, *e.g.*, Sec. 300 of the Servicemen's Readjustment Act of 1944, 38 U.S.C. 693g.

[23] See, *e.g.*, Secs. 500, 700, 1503 of the Servicemen's Readjustment Act of 1944, 38 U.S.C. 694, 696, 697c; Fitzgibbons, *op. cit., supra*, note 19, at 17-18; Kimbrough and Glen, *op. cit., supra*, note 19, Sec. 12, p. 10.

tively honorably discharged.[24] Large numbers of veterans would thus be precluded from obtaining certain of these benefits and privileges unless they succeeded in having their discharges or separations revised or reviewed. The Discharge Review Boards to be established under Section 301 were to afford such review.

Section 301, as it was originally introduced, contained the identical language now appearing in Section 301 of the 1944 Act, to the effect that "review shall be based upon all available records of the service department * * * and such other evidence as may be presented" by the person seeking review." Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917, p. 3; Hearings before the Subcommittee on Veterans' Legislation of the Senate Committee on Finance, 78th Cong., 2d Sess., on S. 1617, p. 191. See footnote 18, *supra,* pp. 30-31. That this language was not intended to preclude the Discharge Review Board from considering any pertinent evidence was demonstrated early in the Senate Subcommittee's hearings on S. 1617. In discussing the meaning and effect of the proposed Section 301, it was pointed out that what was being sought was "congressional approval" of a review procedure which would be "based upon all perti-

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[24] See, *e.g.*, Sec. 2 of the Veterans' Preference Act of 1944, 5 U.S.C. 851; Sec. 1 of the Mustering-Out Payment Act of 1944, 38 U.S.C. 691a; Sec. 8 of the Selective Training and Service Act of 1940, 50 U.S.C.App. 308(a); Kimbrough and Glen, *op. cit., supra,* note 19, Sec. 11, p. 9.

nent evidence."[25] Hearings before the Subcommittee on Veterans' Legislation of the Senate Committee on Finance, 78th Cong., 2d Sess., on S. 1617, p. 13. It was also emphasized that Section 301 authorized the Review Boards to act "in accord with the facts presented" to the Boards. Hearings before the Subcommittee on Veterans' Legislation of the Senate Committee on Finance, 78th Cong., 2d Sess., on S. 1617, p. 190. On the other hand, it is significant that there is not a single statement in any of the debates, hearings, or committee reports which supports respondent's suggestion that the Boards were to be limited only to technical "service records" and such evidence as the applicant-for-review introduced.

2. At the House hearings on the measure, it was frankly conceded by representatives of the War Department that the language of Section 301, as it appeared in S. 1617 and H. R. 3917, was broad enough to include review of "the case of an officer who comes before a retiring board, and that board finds that his disability is not incurred in the line of duty and he is discharged from the service." Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917, p. 197. Reasons similar to those

[25] This statement was made by Mr. Atherton, as the National Commander of the American Legion, which had been largely responsible for the introduction of S. 1617 and other bills which led to the 1944 G. I. Bill of Rights. See Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917 and S. 1767, pp. 29-30, p. 90, p. 122.

prompting the review of improperly issued non-honorable discharges suggest that it is desirable to give a disabled officer who has been erroneously retired without pay an opportunity to have his status corrected. The War Department, however, objected to this broad scope of Section 301 and suggested that the language be restricted "so that it does not provide for a review of proceedings in which an officer is retired or discharged without pay." Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917, p. 207.[26]

This War Department suggestion was adopted in S. 1767, which was introduced on March 13, 1944, by Senator Clark on behalf of himself and 80 other Senators (90 Cong. Rec. 2491), and which ultimately became the Servicemen's Readjustment Act of 1944. At that time, Senator Clark's subcommittee had completed its hearing on S. 1617, and it was decided to abandon S. 1617 in favor of S. 1767. *Idem.* Section 301 of S. 1767, in its original form, carried the same language and provisions appearing in Section 301 of the preceding bills

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[26] Representative Kearney, a member of the House Committee on World War Veterans' Legislation, stated, in connection with this War Department suggestion, that he was personally "going to insist" upon a provision for review of the retiring cases "when it comes to writing this bill." Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., on H. R. 3917, 2d Sess., p. 208. For Mr. Kearney's part in seeing that retired officers were clearly covered, see *infra*, pp. 40-41.

(H. R. 3917 and S. 1617), but specifically excepted from the Review Board's authority cases involving "denial [to officers] of retirement with pay." S. Rep. No. 755, 78th Cong., 2d Sess., p. 17.

The Senate Committee on Finance reported S. 1767 one week later, with an amendment which struck out that specific exception. S. Rep. No. 755, 78th Cong., 2d Sess., p. 17. This Committee amendment was agreed to on the floor of the Senate and Section 301, without any exception of cases involving denial of retirement pay, and in the general terms in which it had appeared in the earlier bills, was passed by the Senate along with the rest of the G. I. Bill. 90 Cong. Rec. 3081. While the bill in this form contained no Section 302, the Senate's adoption of the Committee amendment shows that Section 301 was viewed as affording review of decisions retiring officers without pay.

S. 1767 was then referred to the House Committee on World War Veterans' Legislation. 90 Cong. Rec. 3156. That Committee, which had theretofore been considering H. R. 3917, the earlier House measure equivalent to S. 1617, undertook the consideration of S. 1767, which it reported out with several amendments to Section 301 (H. Rep. No. 1418, 78th Cong., 2d Sess., pp. 1, 6). None of these amendments affected the presently pertinent language of the section or its coverage of cases involving denials of retirement with pay. 90 Cong.

Rec. 4332.[27] On the contrary, Representative Cunningham, a member of the Committee, referred to the broad scope of Section 301 and stated that "it was the thought of the committee * * * to cover all veterans" and that the only exception concerned "those who were dishonorably discharged as the result of a general court martial." 90 Cong. Rec. 4538. S. 1767 was passed by the House, on May 18, 1944, without any other changes made in Section 301. 90 Cong. Rec. 4678.

3. The Senate disagreed generally with House amendments to the bill and a conference was held. 90 Cong. Rec. 4698; 4769. The conference bill was submitted and agreed to in the Senate on June 12, 1944, and in the House on June 13, 1944. 90 Cong. Rec. 5752, 5760, 5841, 5853. The conference amended Section 301 so as to allow the Board to review discharges on its own motion, and changed the ten-year statute of limitations, suggested by the House, to fifteen years.

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[27] The House Committee also inserted a prohibition against review unless an application for review was filed within ten years after discharge or the date of the Act, whichever was later. 90 Cong. Rec. 4333. This statute of limitations was suggested by the War Department. Hearings before the House Committee on World War Veterans' Legislation, 78th Cong., 2d Sess., on H. R. 3917, p. 346.

Section 301, as it had originally been introduced in the earlier bills (see fn. 18, *supra*, pp. 30-31) permitted review even of dishonorable discharges ordered by a general court-martial, but such discharges were later specifically excluded, and section 301 of S. 1767, as it was introduced, contained this exclusion. See S. Rep. No. 755, 78th Cong., 2d sess., pp. 5, 17.

The conference also added the separate Section 302. In the words of the House managers, "the conference agreement also includes an additional section 302, authorizing *under similar conditions and limitations* [to those imposed in Section 301] the establishment of boards of review in cases of retirement of officers without pay because of physical disability." H. Rep. 1624, 78th Cong., 2d Sess., p. 20, 90 Cong. Rec. 5848 (italics supplied). Since, as we have shown, Section 301 as it passed both houses was admittedly broad enough to include these cases (*supra*, pp. 36-39), it seems evident, as suggested above (footnote 26, *supra*, p. 37), that Section 302 was added so as to satisfy Representative Kearney, who, out of an abundance of caution, insisted upon its insertion in conference.[28] Representative Cunningham, another member of the House Committee, in discussing the conference agreement, pointed out that the bill "as it came from conference is substantially the bill as it passed the House" and that "in title I [in which Sections 301 and 302 were included] there are no

[28] This is made clear by the history of the later Act of December 28, 1945 ("To amend the Servicemen's Readjustment Act of 1944, and for other purposes"), 59 Stat. 623, which shows that Mr. Kearney, in order to make absolutely certain that these retirement cases would be reviewed, offered Section 302 "as an amendment to the G. I. bill in the conference." Hearings before the House Committee on World War Veterans' Legislation, 79th Cong., 1st Sess., on H. R. 3749 [the bill which became the Act of December 28, 1945], p. 206. Mr. Kearney stated in the course of those hearings that he had "draw[n] up that amendment." *Id.*, p. 207.

material changes." 90 Cong. Rec. 5848. And the House manager's statement, quoted above, indicates that the sections were closely allied.[29]

4. The foregoing history shows that (a) Congress desired to afford veterans separated from the service under conditions which would affect their rights and privileges as ex-servicemen an opportunity to have their discharges or separations reviewed and revised; (b) the general discharge review boards established by Section 301 were to obtain as complete a picture as possible of the true facts and circumstances, and were not confined to technical "service records" and the veteran's evidence; (c) Section 302 boards, involved here, are cognate and twin to the Section 301 boards, perform the same function in the limited class of retirement cases, and were intended to have comparable powers and duties of inquiry and investigation.

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[29] It was probably thought unnecessary to include a similar provision for enlisted personnel because, with the exception of those with very long service, disabled enlisted men are taken care of by the pension system administered by the Veterans' Administration (which has established procedures for review of disability claims) rather than through retirement pay. Officers are the main beneficiaries of the retirement pay system administered by the armed services. See Fitzgibbons, *op. cit., supra*, fn. 19, at 2, 22-35; Kimbrough and Glen, *op. cit., supra*, fn. 19, ch. XIV; Sen. Doc. 152, 78th Cong., 2d *Sess., supra*, fn. 19, at 73 *et seq.* In general, a veteran cannot receive both a Veterans' Administration pension and the ordinary amount of retirement pay. Kimbrough and Glen, Secs. 712, 715, 800; Sen. Doc. 152, at p. 81.

Congress clearly intended to permit the general discharge boards established by Section 301 to consider "all pertinent evidence," *supra*, pp. 35-36, and these boards could certainly not fulfill their very important functions if they were limited in the way that respondent and the court below would restrict the Section 302 boards.[30] But the almost-identical wording and intimate historical alliance between the two sections prove that both have the same powers to receive and consider evidence. It follows that both must have authority to consider data comparable to the Veterans' Administration reports at issue here, or, if the lower court's view is accepted, that the much more significant Section 301 boards are seriously hobbled in their reviewing work — contrary to the plain legislative purpose and directive.

C. *The Administrative Construction of Section 302 Is in Accord*

1. *Consistent administrative practice:* Within three months after Section 302 took effect, the War Department, recognizing that intelligent review called for consideration by the Disability Review Boards of all available evidence, directed the Boards to consider "all available War Department and/or *other records* pertaining to the health and physical condition of the applicant" and to "examine all War Department records and all

[30] See the letter from the President of the Army Discharge Review Board (established under Section 301) quoted in footnote 32, *infra*, pp. 43-44.

available evidence, together with all contentions submitted on behalf of the applicant and evidence in support thereof" (WDGAP 334, Secretary of War's Disability Review Board, October 21, 1944, quoted in part in respondent's complaint, R. 3; italics added). The Army has followed that directive consistently and the current recodification of the Army regulations contain identical instructions. See 32 CFR 581.1(a)(2)(iii). Similar instructions govern operations of the Air Force Disability Review Board, 32 CFR 881.32(c) and the Navy Retiring Review Board, 32 CFR 722.3 (g), which were also established under Section 302.[31] The same procedure, in calling for Veterans' Administration reports and other pertinent evidence, is also followed by the general Army Discharge Review Board created under Section 301, from which (as we have seen) Section 302 was derived and which has language almost identical to that in Section 302. See *supra*, pp. 27 *et seq.*[32]

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[31] Veterans' Administration examination reports have accordingly been considered by the Review Boards whenever available. As of July 28, 1950, the Army Review Board had decided 3,261 cases. In many of these cases in which the Review Board authorized retirement pay benefits the Veterans' Administration reports constituted the basis for favorable action. They have, of course, likewise played an important part in many disallowed cases.

[32] In a letter dated December 28, 1950, the President of the Army Discharge Review Board advised the Solicitor General that:

> The Army Discharge Review Board established under

The rule is well-settled that consistent administrative construction of a statute, controlling the settlement of many cases,[33] is entitled to great weight and "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States* v. *Citizens Loan and Trust Company,* 316 U. S. 209, 214. This principle of deference to administrative construction has, of course, special applicability to legislation as relatively new as the Servicemen's Readjustment Act of 1944, for "administrative practice, consistent and generally unchallenged * * * has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Company* v. *United States,* 288 U. S. 294, 315; *United States* v. *American Trucking Ass'ns., Inc.,* 310 U. S. 534, 549;

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the provisions of Section 301, Public Law 346, 78th Congress, approved 22 June 1944 (38 USC 693h) does not base its decision on a review of Army records alone where other records are available. The board on numerous occasions has called for records and information from civilian hospitals, courts, institutions, Veterans Administration, etc. In fact it is the desire of the board to get a complete picture on the appellant in order that no injustice will be done in reaching a decision on whether or not his type of discharge should be changed.

[33] See footnotes 31 and 32, *supra.*

Adams v. *United States,* 319 U. S. 312, 314-315; *Edward's Lessee* v. *Darby,* 12 Wheat. 206, 210.

We have already shown that, at the very least, there is a thoroughly reasonable basis for the administrative construction placed on Section 302 (a). *Supra,* pp. 14-42. In fact, the instant case represents the first and only instance, among the thousands of cases reviewed by the Boards, in which the administrative construction has been challenged. Since that construction is not clearly wrong, the principle of deference to consistent administrative construction shows that the court below erred in ruling as it did.

2. *Legislative acquiescence in the administrative practice:* On December 28, 1945, more than fourteen months after this administrative construction had been formally announced by the War Department, Congress re-enacted Section 302, without any change here pertinent. The history of the bill which became the Act of December 28, 1945, suggests that this reenactment should be construed as acceptance and approval of the administrative practice.

a. H. R. 3749 was introduced in the 79th Congress, 1st Session, to remedy certain difficulties and inadequacies that had appeared in the course of the operation of the Servicemen's Readjustment Act of June 22, 1944. Hearings on the bill were held by the House Committee on World War Veterans' Legislation, in June and July 1945.

and by the Subcommittee on Veterans' Legislation of the Senate Committee on Finance, in October 1945.[34] In the House hearings, the veterans' organizations' representatives testified that "the provisions of title I [which includes Section 302] are working satisfactorily. We find very few complaints about any of the provisions in title I." P. 181. Other representatives, in answer to a question as to whether "the situation is working out all right" in cases coming before the Review Boards, stated that the "Board has been very fair. I think they are doing a splendid job." P. 196. Still another representative stated that "Title I has been working very well in most respects * * * particularly as to the reviewing authority as to discharge certificates and as to officers' retiring benefits." P. 213. The only amendment suggested in the House with respect to Section 302 was a language change which would make it clear that the Review Boards' authority extended to decisions of Boards of Medical Survey, the Navy counterpart of the Army Retiring Boards. Hearings before the House Committee on World War Veterans' Legislation, 79th Cong., 1st Sess., on H. R. 3749, pp. 207, 213. This clarifying amendment appeared in a House Committee amendment to H. R. 3749 when it was reported out to the House. See 91 Cong. Rec. 7719.

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[34] These committees, of course, had also considered the bills which led to the 1944 Act. See *supra*, pp. 30-31, 35-39.

In the hearings on the bill before the Senate Subcommittee, it was pointed out that apart from the loan and educational provisions, "the act seems to be working fairly well." P. 220. In the course of those hearings, additional language was added to make it clear that the Review Boards would have authority to review determinations of Disposition Boards as well as retiring boards and Boards of Medical Survey. P. 247. This additional language, adopted by the Senate Committee (91 Cong. Rec. 10499, 10503), was the only material change in Section 302 passed by the Senate.[35]

In conference, numerous changes were made with respect to other provisions of the bill and of the Servicemen's Readjustment Act of 1944. But Section 302(a) was not affected. The chairman of the House Committee on World War Veterans' Legislation and Representative Rogers who, along with the chairman, managed the bill for the House in conference, pointed out that the conference version simply "clarifies the intent [of the original act] by including findings and decisions of boards of medical survey and disposition boards." 91 Cong. Rec. 12373, 12377.

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[35] One other Senate language change broadened "the class of those who may apply [for review] to include any officer *released from active service.*" 91 Cong. Rec. 10503 (Italics supplied). Section 302, as passed in 1944, had applied to officers *released to inactive service* for physical disability without pay. 58 Stat. 287.

b. As this history proves, Title I, including Section 302, was deemed by the veterans' organizations — which are the informal watchdogs of the review boards and which were undoubtedly familiar with the fourteen-month-old administrative practice of considering all available evidence and records — to be fulfilling its purposes. In sharp contrast to the expressed dissatisfaction with the working of the educational and loan provisions of the 1944 Act, which led to numerous amendments to those sections, there was no intimation by the veterans' organizations or by the legislators that the review boards were acting improperly or that the scope of their review was too wide. In these circumstances, it is a reasonable inference that Congress accepted and acquiesced in the administrative practice. Cf. *United States* v. *Zazove*, 334 U.S. 602, 622-623; *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 500.

II

Even if Section 302 may be construed to prevent the Review Board from initially considering Veterans' Administration reports, that limitation should not be applied to a Review Board rehearing of its own decision adverse to the applicant

While we believe that Section 302 cannot be construed to prohibit the Disability Review Board from considering Veterans' Administration medical reports, it is appropriate to note that even if such a limitation is read into the Act, it should not affect what is involved here—a Review Board's

rehearing of its own decision adverse to the applicant. Such a limitation should apply, at most, only to the initial hearing referred to by Section 302.

Section 302 grants the retired officer a right to a review by the Disability Review Board of the adverse retiring board decision. Here, such a review was sought and, in accordance with the language of respondent's complaint, "a hearing was held pursuant to Section 302 of the said statute, and at said hearing the record presented to the Board was in accordance with the terms of the statute in that it consisted solely of the plaintiff's service records and evidence submitted by him" (R. 4). It is apparent, therefore, that as far as the hearing required by the statute is concerned, the record before the Disability Review Board was limited to the extent urged by respondent and that it did not include any of the Veterans' Administration reports here in question. The Board's adverse decision was rendered on a record containing only evidence of the type which the respondent and the court of appeals assert may be considered.

Section 302, while requiring the Review Board to give a hearing with respect to its initial review of the Retiring Board's decision, in no way requires the Review Board to grant a rehearing to the retired officer after it has, as here, once affirmed the Retiring Board's decision. That rehearing is granted as a matter of grace, and, as is true of other administrative bodies, is a matter

exclusively committed to administrative discretion. *I. C. C.* v. *Jersey City,* 322 U. S. 503, 514; *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535; *United States* v. *Northern Pacific Ry. Co.,* 288 U.S. 490, 494. Since the rehearing is discretionary and in no way required by the statute, it would seem that the Board can attach whatever reasonable and fair requirements it wishes; and a requirement that such pertinent evidence as official Veterans' Administration medical reports be considered is certainly reasonable. The result is, in this particular case, that even though the statute be read so as to require the exclusion of Veterans' Administration reports, that exclusion should pertain only to the first review authorized and required by statute, and should not be extended to affect the rehearing here involved, which was granted as a matter of grace by the Board.

III

Since the Review Board's construction of the statute is at least reasonable, its proceedings cannot be controlled by mandamus

A. The considerations set forth above show, at a minimum, that there is ample and reasonable basis for doubting the soundness of respondent's contention that Section 302(a) of the Servicemen's Readjustment Act required the Disability Review Board to blind itself to Veterans' Administration medical reports. Those considerations, which also led the Board to interpret Section 302(a) so as

to reject respondent's contention, take on even greater significance in a mandamus action, such as this. There is then brought into play the firmly-established rule that where an administrative duty "depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States,* 281 U.S. 206, 219; see *Decatur* v. *Paulding,* 14 Pet. 497, 515; *Hall* v. *Payne,* 254 U.S. 343, 347-348; *Ness* v. *Fisher,* 223 U.S. 683, 691-692; *Work* v. *Rives,* 267 U.S. 175, 177-178; *United States ex rel. Chicago Great Western Railroad Co.* v. *I.C.C.,* 294 U.S. 50, 61-3. This, of course, is merely one application of the traditional rule that decisions of administrative officers involving the exercise of discretion and judgment, and in so far as they are not unreasonable or plainly wrong, will not be set aside by process in the nature of mandamus. *Wilbur* v. *United States,* 281 U. S. 206; *Denby* v. *Berry,* 263 U.S. 29; *United States ex rel. Girard Trust Co.* v. *Helvering,* 301 U.S. 540; *Keim* v. *United States,* 177 U.S. 290, 292; *Hammond* v. *Hull, et al.,* 131 F. 2d 23 (C.A. D.C.), certiorari denied, 318 U.S. 777; *United States ex rel. Roughton* v. *Ickes,* 101 F. 2d 248 (C.A. D.C.). "Where there is discretion * * * even though its conclusion be disputable, is is impregnable to mandamus." *Alaska Smokeless Coal Co.* v. *Lane,* 250 U.S. 549, 555.

This rule that discretionary action on the part of executive officers acting within the scope of their statutory authority will not be controlled by the courts has particular force as applied to the military establishment. This Court has repeatedly refused to sanction judicial intrusion into the realm of ordinary military and naval administration. "To those in the military or naval service of the United States the military law is due process." *Reaves* v. *Ainsworth,* 219 U.S. 296, 304. In that case, where a former Army officer sought a writ of certiorari in the District of Columbia courts to review the proceedings of an Army promotion board finding him not qualified for promotion, and to annul an order made by the President discharging him from the Army, the proceedings were held to be not subject to review by the courts. This Court said (219 U.S., at 306):

> * * * The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. * * * If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embar-

rassment of such a right to the service, indeed the detriment of it, may be imagined.

See also *French* v. *Weeks*, 259 U.S. 326, 335-6; *Creary* v. *Weeks*, 259 U.S. 336, 344; *Denby* v. *Berry*, 263 U.S. 29, 33-4.

B. The foregoing rules are not changed by anything in the Administrative Procedure Act. Section 10 of that statute, setting forth the provisions for judicial review of adminisrative action, is the only provision which could conceivably apply here.[36] But the terms and history of the Act make it clear that Section 10 was designed in general to restate existing law (see the Government's brief in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, No. 42, this Term, pp. 59-68; 90-91), and that there was no intention to change the rules governing judicial review in such a traditional form of proceeding as mandamus. House

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[36]Application of other provisions of the Act would furnish respondent no comfort. For example, Section 7(c), which deals with the admissibility of evidence in hearings, would require rejection of respondent's contention that Veterans' Administration reports may not be considered by the Review Boards. For Section 7(c) provides that "*any* oral or documentary evidence may be received." (Italics supplied.) That section also provides that the agencies shall exclude irrelevant, immaterial or unduly repetitious evidence. But there is no doubt that the Veterans' Administration reports here involved are material, are relevant and are in no way repetitious. Indeed, the only possible means of explaining respondent's objection to their consideration is that they are material to the decision required to be made by the Review Board.

Hearings Before Committee on Judiciary on H. R. 184 etc., 79th Cong., 1st sess., pp. 37-38 (Sen. Doc. 248, 79th Cong., 2d sess., pp. 83-84); Sen. Rep. No. 752, 79th Cong., 1st sess., pp. 38, 43, 44; (Sen. Doc. 248, 79th Cong., 2d sess., pp. 224, 229, 230). Section 10 was not designed to disturb the settled rule, discussed *supra*, pp. 50-53, which limits mandamus to cases of ministerial action, clear abuse of discretion, or plain misreading of a statute. Since *Decatur* v. *Paulding*, 14 Pet. 497, decided in 1840, this Court has consistently restricted mandamus to such cases. Certainly, if Congress in passing the Administrative Procedure Act had intended to alter this historical principle and to invest the Federal courts with the power of judicial review over the normal incidents of military and naval administration, apt language could easily have been fashioned, would certainly have been used, and the change would have been mentioned. The fact that neither the rule as to the scope of relief in mandamus nor that as to non-reviewability of action pertaining to military and naval administration was referred to, seems to us to be convincing proof that no change in either was intended to be made.

IV

Respondent failed to exhaust his administrative remedy

In any case, the decision of the court of appeals violates the well-settled rule that there must be an

exhaustion of administrative remedies before recourse may be had to the courts. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Federal Power Commission* v. *Arkansas Power Co.*, 330 U.S. 802; *S. E. C.* v. *Otis and Co.*, 338 U.S. 843.

The respondent has been accorded a hearing by the Review Board, as a result of which the findings of the retiring board were affirmed in part and reversed in part. The rehearing which the Review Board later granted has never been held because, although scheduled on three occasions, it has been postponed twice upon the respondent's request, and a third time because of this suit. The Veterans' Administration reports in question have never been considered by the Review Board or any action taken thereon,[37] and, until the Review Board has acted and denied the claim, there is no showing by the respondent of any injury. Only by resorting to speculation and conjecture may an adverse decision be anticipated. For aught that appears, these additional documents may constitute the very evidence needed by the Review Board, on rehearing, to reverse completely the findings of the retiring board and grant respondent full retirement privileges and any other benefits which may

[37] As shown above (pp. 4-5, 49), respondent admits that on his first hearing the Review Board did not consider, or have before it, the Veterans' Administration reports.

accrue from such changed findings — in which event he would have no cause to complain. This is the very situation contemplated by the exhaustion rule and the reason for its establishment. The premature interference with the administrative process allowed by the court below can be avoided only by requiring respondent to exhaust the remedies afforded to him before the Review Board.

The exhaustion principle should be applied regardless of whether or not respondent may be able to secure judicial review of the merits of an adverse decision by the Board, finally approved.[38] Cf. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 544-5. Even if a review on the merits of the

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[38] Like Section 302, here involved, Rev. Stat. 1250, 10 U.S.C. 965, provides that the proceedings and decision of Army retiring boards "shall be transmitted to the Secretary of War, and shall be laid by him before the President for his approval or disapproval and orders in the case." Since 1861, the War and Army Departments have consistently followed the practice of not actually transmitting the proceedings and decision of retiring boards or Disability Review Boards to the President, and the Secretary of War (or of the Army) has acted in his stead, usually issuing his order "by direction of the President"—though no express delegation of authority from the President has been found. There are now pending in the Court of Appeals for the District of Columbia Circuit two cases raising the question whether this practice has been valid or whether the President should have personally passed upon each determination. *Updegraff* v. *Pace*, C.A.D.C., No. 10546; *Almour* v. *Pace*, C.A.D.C., No. 10295. Cf. Pub. L. 673, 81st Cong., 2d Sess., approved August 8, 1950 ("An Act to authorize the President to provide for the performance of certain functions of the President by other officers of the Government, and for other purposes").

Board's decision would not then be available, as the court below suggests (R. 26), we believe that if respondent would now be entitled—the exhaustion doctrine aside—to mandamus the Board not to consider the Veterans' Administration reports, he may, after an adverse decision, secure a judicial directive requiring the Board to reopen its proceedings and reconsider the matter apart from the excluded data. Judicial intervention at that stage would be preferable to intervention at the present time, when respondent cannot show that he has been hurt. Cf. *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294; 64 Harv. L. Rev. 490, 491 (Jan. 1951).

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is erroneous and should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 295

COLONEL HENRY S. ROBERTSON, PRESIDENT, ARMY REVIEW BOARD,

Petitioner,

vs.

ROBERT H. CHAMBERS

BRIEF IN OPPOSITION

H. RUSSELL BISHOP,
Counsel for Respondent.

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BRIEF IN OPPOSITION

Opinions Below

The opinion of United States District Court for the District of Columbia is not reported. It is in the record at page 19. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 22-28) is reported at 183 F. (2d) 144.

Jurisdiction

It is believed this Court has jurisdiction under 28 U. S. C. 1254(i).

Statement

The statement contained in Petitioner's Brief is a fair summary of the proceeding to the time of filing the petition

and, therefore, no additional statement is made by respondent.

Question Presented

Where an enabling statute creating an administrative board limits by specific description the documentary evidence which shall constitute the record before such board, and the head of such board has disregarded the limitation by adding documents of an entirely different class to such record, and refuses to remove such documents upon the request of the party entitled to be heard, may the party entitled to be heard apply for and obtain a mandatory order from the court compelling the removal of said document?

Statute Involved

The statute involved is Section 302 of the Servicemen's Readjustment Act of 1944 (pars. (a) and (b) (38 U. S. C. 693i (a) and (b)). The statute reads as follows:

> "(a) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under

this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

"(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after (June 22, 1944), whichever is the later."

ARGUMENT

I

The Power of the Army Review Board to Consider Veterans' Administration Medical Reports or Any Other Evidence Is Governed by the Statute.

Petitioner's Argument, Point 1, commencing on page 8 of his brief completely overlooks the fact that this was a statute which not only conferred a right or privilege, but provided in great detail the procedure which should be followed by the Board in reviewing the case of Respondent or any one similarly situated.

The statute (38 U. S. C. 693i (a) and (b)), while short, is one that was obviously drawn with scrupulous care. The greater part of the statute consists of procedural matters. Thus it provides that a board of five members shall have two medical officers as members; that the review shall be based upon all the available service records relating to the officer requesting review, and such other evidence as may be presented by the officer; that witnesses may present testimony

in person or by affidavit; that the officer may appear in person or by counsel; that the reviewing board shall have the same powers as exercised by or vested in the board whose findings and decisions are being reviewed; that the decision of the reviewing board shall be transmitted to the Secretary of the Army and be laid by him before the President for his approval or disapproval and orders in the case.

Petitioner's argument completely overlooks the fact that this is not the type of statute which provides for administrative review and hearing and the statute leaves it to the administrative body to determine what method of review will be followed. Many of the Petitioner's arguments would be valid if they applied to such a statute, with provisions for Court review, but Petitioner's argument ignores the fact that the Army Review Board was created by a statute which clearly sets forth the procedure which is to be followed. General propositions regarding administrative hearings can have no application where a statute such as this is involved. It is elementary that where the legislature creates an administrative body and states what the procedure is to be before that body, the administrator can neither enlarge nor limit the procedure, but must follow the dictates of the statute. *Morgan* v. *United States*, 298 U. S. 468.

II

Construction of the Statute

A. *The purpose and meaning of the statute.*

Petitioner states on page 11 of his brief:

> "The Court, in other words, inserted the word 'only' in the sentence, so that it read the statute as declaring that 'such review shall be based *only* upon' the service records and the officer's evidence. Since the Veterans'

Administration medical reports were assumed not to be service records (3) and obviously did not fall within the second category, their consideration by the Review Board would, in the opinion of the court below, violate Section 302."

To this is added the following footnote:

"It is very questionable whether the assumption that the Veterans' Administration records were not 'available service records' within the meaning of Section 302 is correct."

What the Court actually said is found on page 27 of the Record:

"Each of the parties has stated a contention which, if true, would rule this issue his way. The crux is whether the language of the section relied on by appellee modifies or affects that relied on by appellant. If this presented a doubtful situation where the language urged by appellant did not plainly carry and require the meaning he asserts, we would hesitate to uphold this remedy (United States *ex rel.* v. Interstate Commerce Commission, 294 U. S. 50, 61; Interstate Commerce Commission v. New York, N. H. & H. R. Co., 287 U. S. 178, 203-204). However, the requirement of the section is clear and unequivocal. The vital expression is that 'such review *shall be based upon* . . .' (emphasis added). These words are words of exclusion of all evidence not specified in that sentence. The language urged by the appellee does not qualify this requirement. In fact, if it affected this requirement in any way, it would be to destroy it entirely. This is true because, if the Board can consider any evidence other than the service records and such as the officer might present, such action would clearly allow the Board to *base* its decision in whole or part upon this additional proof. 'No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall,

> if possible, be accorded to every word. . . .' Market Co. v. Hoffman, 101 U. S. 112, 115' (*Ex Parte* The Public National Bank of New York, 278 U. S. 101, 104). The general language emphasized by appellee can and does cover many other matters of practice and procedure. The two statutory provisions must and can be construed so that both may be preserved. Congress never intended to destroy the plainly expressed required evidentiary basis for decision by the Board."

To dispose of the footnote first, it should be pointed out that the ruling of the Court that "service records" does not comprehend Veterans' Administration records is based on no mere assumption. The Court states in its opinion (R. 24-25):

> "The fact situation is undisputed, being admitted by the motion to dismiss and, apparently, conceded otherwise. This fact is that the Veterans' Administration reports, made after discharge of appellant, are not 'service records relating to' appellant."

In ruling as it did the Court of Appeals added no words to the statute. When a provision of a statute states that a "review shall be based upon" a certain record, it is tantamount to saying that "the record shall consist of certain specified evidence." Whatever disposition this Court makes of the petition herein, its order granting or denying the writ will be "based upon" the transcript of the record. So the statute here provides that the Army Review Board in disposing of a case before it shall review such case and that "such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." This, Respondent contends, sets the bounds of the record which the Review Board may consider and those words were used to accomplish that purpose.

Petitioner states that this limitation may unduly restrain the Board in its deliberations and precludes intelligent review and fairness of decision. Conceding, *arguendo*, that this may be true, it is no concern of the Board or of this Court. Certainly nothing in the jurisprudence of this Court is more firmly established than that when the Congress enacts legislation which is fairly within its powers the Courts will not concern themselves with the wisdom of the legislation. *De Zon* v. *American President Lines*, 318 U. S. 660; *Markham* v. *Cabell*, 326 U. S. 404; *Billings* v. *Truesdell*, 321 U. S. 542.

If, as petitioner contends, the statute as written hamstrings the Board in its deliberations, its remedy is to apply to the Congress for an amendment, not to adopt regulations clearly in opposition to the statute.

Careful reading of the statute will show that it is not inexpertly drawn, crippling the Board in carrying out its duties.

Initially it should be borne in mind that this statute, instead of providing for a *de novo* proceeding, provides for a review—a review of the findings and decisions of the retiring board which had adjudicated the case of the officer seeking review. Instead of providing for a permanent board which should review all cases, the statute provided for a separate review board for each case. It is thus that retiring boards are created, a board being appointed to hear and decide the case of each officer ordered before it for the purpose of inquiring into the subject of whether or not he should be retired, discharged or retained in active service.

The statute insofar as the Department of the Army is concerned was enacted for the purpose of enabling all officers who had been retired or released from active service without pay, pursuant to the decision of an Army Retiring Board, to a review of the findings and decision of the retiring board

which had adjudicated his case. The reason for restricting the evidence to the service records of the officer is obvious. The Disability Review Board is set up for the purposes of determining whether or not the action of the retiring board should be sustained or reversed. The board of review in order to function within the intent of the statute must therefore place itself as nearly as possible in the position of the retiring board whose action it is to review. This can only be accomplished by restricting the record to those facts which the retiring board had before it, in other words, to the service records of the officer which would necessarily include the proceedings of the retiring board, and "such other evidence as may be presented by such officer," which he may present for the purpose of showing that the action of the retiring board was erroneous.

It is submitted therefore that the decision of the Court of Appeals and its construction of the statute is sound and that in accordance with the oft-repeated rulings of this Court, the wisdom of the statute is not open for the Court's consideration.

B. *The right to examination of the Veterans' Administration reports.*

Under this subheading commencing on page 12 of his brief petitioner pitches his argument on the theme of fairness. It is argued that since Respondent could and did inspect the Veterans' Administration reports and was thus granted an opportunity to "refute, explain, or show possible inaccuracies," in such reports that "fairness to Respondent does not require exclusion of the reports from consideration by the Review Board."

Respondent does not believe that there is any question of "fairness" in this case unless that term be used synonymously with justice. If so, then the question is whether or not Respondent should be compelled to meet and refute

evidence which by the clear provisions of the statute the Review Board has no power to consider. The answer seems so clearly to be that he should not be so compelled, that to argue that this is the correct answer is to belabor the obvious.

C. *Consistent Administrative Construction of the Act.*

Under this heading, commencing on page 13, the Petitioner quotes statistics which are not of record, attempting to show that the Review Board has consistently construed the statute to permit the inclusion of Veterans' Administration reports in the record before it. In addition to being dehors the record, there is no statement as to whether this practice was ever challenged.

Petitioner made the same argument and quoted the same statistics in the Court below, and that Court disposed of it as follows:

> "As to the second, a short answer would be that the record here is barren of evidence of any long continued and much used administrative practice. However, even accepting the factual basis of long administrative action (as stated in the rebuttal brief), this simply brings into play the rule that such practice should not be overturned unless a different practice is plainly required by the statute. Whether there is here such plain requirement will be determined hereinafter."

The plain words of the statute are at variance with the alleged consistent administrative practice which should, therefore, be set aside. *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294; *Alaska S. S. Company* v. *United States*, 290 U. S. 256.

III

Mandamus Is the Appropriate Remedy

Petitioner states that the decision of the Court of Appeals does violence to the firmly established rule that decisions of

administrative officers involving the exercise of discretion, when not unreasonable or plainly wrong, will not be set aside by an order in the nature of mandamus, citing authorities on page 15 of his brief. Respondent agrees that there is such a rule amply supported by the authorities. Respondent further agrees that "where the duty . . . depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which can not be controlled by mandamus."

It is equally well established that where there is nothing to construe a statute requires no construction, and that an administrative officer can not remove himself from the orbit of an order in the nature of mandamus upon the pretext that he must construe a plain, unambiguous statute. The result which could be obtained by permitting the use of such a stratagem is flatly stated by this Court in *Roberts v. U. S. ex rel. Valentine*, 176 U. S. 211 at page 231, as follows:

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer.

> Unless this be so the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

This case turns upon the question of the meaning of the term "service records" and Respondent has contended all along that the meaning of this term is so well understood by military men that there is no question as to whether or not Veterans' Administration reports are included within that term. No one has seriously contended that such reports were included in the term "service records," but the attitude of the Board has been—they will be included nevertheless. In so ruling and adhering to this ruling the Board has consistently violated the Act; has refused to perform a ministerial duty in refusing to remove said reports, and, therefore, mandamus is the proper remedy to obtain their removal.

IV

Insofar as He Was Required to Do So, Respondent Exhausted His Administrative Remedies

On page 16 of his brief Petitioner argues as he did below that Respondent failed to exhaust his administrative remedies, and therefore, the action was premature. In sup-

port of this contention Petitioner cites: *Myers, et al* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley* v. *Waterson S. S. Corp.*, 327 U. S. 540, 543, 545; *Federal Power Commission* v. *Arkansas Power Co.*, 330 U. S. 802; *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375; *S. E. C.* v. *Otis and Co.*, 338 U. S. 843.

Each of the cases cited deals with a situation where court review was available. Since there is no provision for court review in this statute, the cited cases are not in point.

Furthermore, it can not be overemphasized that the decision of the Court of Appeals in no way disposes of or attempted to dispose of the merits of the case, which is left, where it properly belongs, with the Board. Respondent requested removal of the Veterans' Administration reports; upon refusal of this request he asked for reconsideration and this was refused. He had, therefore, exhausted all administrative remedies available to him and had no choice but to seek court action. It is submitted that he was not required by the exhaustion rule to submit to a hearing based on a record not in accordance with the statute.

Conclusion

The decision of the Court of Appeals is correct. It does not jeopardize decisions previously rendered by the Review Board. It is not in conflict with decisions of this Court concerning mandamus or the exhaustion of administrative remedies. The case is not sufficiently important to justify the issuance of the writ.

H. Russell Bishop,
Counsel for Respondent.

November 6, 1950.

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 295

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Petitioner*

v.

ROBERT H. CHAMBERS

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE RESPONDENT.

H. RUSSELL BISHOP,
Attorney for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW.

The opinion of the United States District Court for the District of Columbia (R. 19) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 22-28) is reported at 183 F. 2d 144.

JURISDICTION.

The judgment of the court of appeals was entered on June 12, 1950 (R. 29). The petition for a writ of certiorari was filed on September 8, 1950 and granted on November 27, 1950. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Respondent believes that the question presented for decision is, as stated in the brief in opposition, namely:

Where an enabling statute creating an administrative board limits by specific description the documentary evidence which shall constitute the record before such board, and the head of such board has disregarded the limitation by adding documents of an entirely different class to such record, and refuses to remove such documents upon the request of the party entitled to be heard, may the party entitled to be heard apply for and obtain a mandatory order from the court compelling the removal of said documents?

STATUTES INVOLVED.

1. Sections 302(a) and (b) of the Servicemen's Readjustment Act of 1944, 58 Stat. 287, as amended, 59 Stat. 623 (38 U. S. C. 693i (a) and (b), which authorized the creation of the Army Disability Review Board and defined its duties and powers, provide as follows:

> (a) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition

board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after (June 22, 1944), whichever is the later.

2. The powers of the Army Retiring Board, "the board whose findings and decision are being reviewed" in this case, and which are specifically vested in the Army Disability Review Board by Section 302 (a), *supra*, are set forth in R. S. 1248 (10 U. S. C. 963):

> A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose.

STATEMENT.

Respondent, Robert H. Chambers, was honorably discharged, for physical disability, as a Captain in the Army on October 2, 1942, pursuant to the decision of an Army

Retiring Board. Subsequent to the passage of the Servicemen's Readjustment Act of 1944, he applied to the Army Disability Review Board for a review, under Section 302 of that Act, of the findings and decision of the Army Retiring Board.[1] A hearing was held by the Review Board on a record which, conformably to the statute, consisted solely of respondent's service records and evidence submitted by him. (R. 4). The Review Board, on June 11, 1945, reversed in part and affirmed in part the findings of the Retiring Board. (R. 4) Respondent requested a rehearing and this request was granted on May 19, 1947. (R. 4) On being notified that the rehearing would be held on October 10, 1947, respondent and his counsel went to the Pentagon to examine respondent's record and prepare for the rehearing (R. 4). Examination of the record disclosed that certain Veterans' Administration reports, written in 1944, two years after respondent's discharge from the Army, had been added to the record in respondent's case. (R. 4-5). Respondent requested that these Veterans' Administration reports be removed from his record on the ground that they were not "service records" and that by the terms of the statute respondent's record must be confined to respondent's service records and such evidence as respondent should submit (R. 5, 8, 9). This request was denied (R. 5, 9, 10); request was made for reconsideration and this in turn was denied (R. 5, 10-16). The rehearing was postponed twice at respondent's request, was finally set for April 6, 1948, and has never been held (R. 23) by reason of the bringing of this action on March 29, 1948.

This action was commenced in the District Court of the United States for the District of Columbia against Brigadier General Danforth, the then President of the Review Board in his official capacity (R. 2). The relief sought was the issuance of a mandatory order directing the President

[1] The complaint, par. 6 alleges that he applied for "a review of his discharge" (R. 4). As is apparent from the remainder of the complaint, and the wording of the statute it was for a review of the findings and decision of the retiring board that application was made.

of the Review Board to exclude the Veterans' Administration reports from respondent's record, and to restrict such record to respondent's service records and documents submitted by respondent as evidence. (R. 2-6).

The case was heard on a motion to dismiss the complaint (R. 17-18). The District Court granted the motion on the grounds (a) the action was prematurely brought because of failure to exhaust administrative remedies, and (b) on the merits because the Court lacks jurisdiction to control the admissibility of evidence by an administrative board by mandamus. (R. 19).

Respondent appealed and during the pendency of the appeal Colonel Henry S. Robertson, petitioner herein, was substituted as appellee (R. 21-22). The Court of Appeals reversed, holding "the fact situation is undisputed; the statute is clear; and the violation thereof by the Board is plain." (R. 28) The judgment directed the District Court to enter judgment "requiring the Board to withdraw the Veterans' Administrations reports from the record before it." (R. 28).

ARGUMENT.

I.

Section 302 of the Servicemen's Readjustment Act of 1944 Prohibits the Use of Post-Discharge Veterans' Administration Reports by the Army Disability Review Board.

The statute after providing for the establishment of Disability Review Boards, sets forth in definite terms the record upon which such review shall be based, in the following words:

> "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

This controversy arose when respondent requested that certain Veterans' Administration reports which had been

added to Army records, be removed from his record. His reason for requesting the removal was plainly stated in a letter dated September 24, 1947, addressed to the then President of the Review Board (R. 8-9). The third paragraph of that letter stated:

> "Captain Chambers was discharged on October 4, 1942, and any reports by the Veterans Administration subsequent to that date would not be a part of his service record. The term "service records" as used in the statute obviously means the records of the branch of the armed services of which the officer was a member prior to his discharge, and does not include the records of other departments of the government."

The reply to this letter stated that the request was denied because the quoted part of the statute "is descriptive in character" (R. 10). Reconsideration was requested and the contentions of the respondent were set forth at some length (R. 10-15). The request for reconsideration was denied with the statement "no reason is perceived to depart from the views" expressed in the letter denying the original request. (R. 16).

The complaint, and the exhibits thereto, (R. 2-16) squarely raised the issue as to the meaning of the term "service records," which was not met by the motion to dismiss (R. 17-18). Petitioner conceded on argument in the Court of Appeals that the Veterans' Administration reports are not "service records relating to" petitioner. The first time that petitioner has intimated that the Veterans' Administration reports could be classified as "service records" was in a footnote on page 11 of the petition for the writ wherein it is stated that the "assumption" that Veterans' Administration records were not "available service records" is very questionable. The question is argued at great length in the petitioner's brief and it is in reply to that argument that the following is addressed.

At the outset, in order that his position may be made clear to the court and to petitioner, respondent states that

there is no question in this case of retirement pay; Sec. 301 of the Servicemen's Readjustment Act has no bearing upon this case as respondent claims no rights under it, and that insofar as other applicants for review are concerned, respondent has not brought a class action, and this case should be decided upon the facts set forth in the record. In other words it is respondent's case which is before the court, not the case of some three thousand odd discharged or retired officers.

A. The meaning of the term "service records" is well understood by military men and does not include records of another governmental department.

Petitioner's counsel has been unable to find any judicial definition of the term "service records." The Court of Appeals in this case has decided what are not service records, viz., Veterans' Administration reports made after discharge. (R. 24-25).

Respondent's contention is that service records mean the record of the service which a military man has rendered from the time of his entry into the service until his discharge. After he has been discharged he obviously cannot render additional military service, and this being so there cannot be additional service records covering a service never rendered.

As stated above, it has never been seriously argued by petitioner that Veterans' Administration reports were service records until the filing of petitioner's brief. Respondent has always understood petitioner's position to be that the Veterans' Administration reports could be included in his record, not because they are "service records", but because the statute does not mean what it says. Petitioner's argument seems to be that the statute should be read as if it were written as follows:

> "Such review shall be based upon all available service records relating to the officer requesting such review, such other records as the Board shall see fit to

consider, and such other evidence as may be presented by such officer."

In order to make this argument petitioner attempts to distort the meaning of "service records."

Petitioner argues on page 16 of his brief that once the Veterans' Administration reports, being governmental reports, were transmitted to the Army and incorporated into its files that they become official records of the Army department and hence "service records" within the meaning of Section 302 of Servicemen's Readjustment Act of 1944. While it is true that they have been transmitted to the Army they have not been incorporated into its files. As respondent understands the procedure before the Review Board these reports at some time will be returned to the Veterans Administration. Any papers which qualify as service records will always be a permanent part of the records of the War Department concerning the particular person to whom they relate. In the Summary of Argument on page 9 petitioner goes even farther and argues that since the Veterans' Administration reports are temporarily in the files of the Army department that they have become available records of the latter agency in the normal meaning of these words. It is true that in the normal meaning of the word "available" the Veterans' Administration reports when they are actually present in the Department of the Army are available to the Department, but they are not records of the Army and therefore not records of the Service Department and they are not "service records." They, therefore, cannot be a part of "available service records" (the expression used in the statute), nor can they be "all available records of the service department," an expression which petitioner urges is an equivalent rendering of "all available service records."

Petitioner next argues that if the term "service record" does not include Veterans' Administration reports that nevertheless the sentence of the statute which is in dispute

when considered in context with the remainder of Section 302 means that the Review Board must at the least consider available service records and the officer's evidence. In support of this argument petitioner argues that the phrase "shall be based upon" may quite properly be construed to use one of the common dictionary meanings of "base" as— "shall commence or start from". It is true that one of the dictionary meanings of the noun "base" is "commence or start from", but this is used in connection with sports or surveying, neither of which activities is being engaged in by petitioner, nor respondent, nor the court. It is the verb "base" not the noun that is used in the statute and this is defined in Webster's International Dictionary thus:—"To put on a base or basis; to found; to establish, as an argument or conclusion; used with *on* or *upon*.

In further support of this argument on page 18 of petitioner's brief, it is stated that this construction is confirmed by the fact that the statute says that the Board's "*review*" and not the Board's "decision", "shall be based upon the specified evidence." If the Board's review is to be based upon specified evidence then its decision must be based upon the same evidence if the decision is to be one that is just and fair.

Continuing, the petitioner states that in the review of cases by a Disability Review Board the crucial issue is whether the officer should have been retired without pay. Such an argument has no application to this case; the officer was not retired without pay; he was discharged, and he is seeking a review of the findings and decisions of a Retiring Board. He is not seeking retirement with or without pay, he is questioning the findings and decision of the Retiring Board which ruled that he should be discharged for physical incapacity.

With respect to petitioner's argument that section 302 provides that a Review Board shall have the same powers as a retiring board, and that a retiring board by virtue of the provisions of R. S. 1248 has the same powers as a court

martial and a court of inquiry; and, therefore, the Review Board is unrestricted in its investigation,—if this argument is sound then the sentence in Section 302 which definitely states the evidence which shall form the basis of review must be entirely disregarded and the statute read as if that sentence were not in it. It seems obvious that the decision of the Court of Appeals is eminently reasonable and in conformity with the decisions of this court concerning statutory interpretation.

The Court of Appeals said (R. 27):

> "The general language emphasized by Appellee (petitioner here) can and does cover many other matters of practice and procedure. The two statutory provisions must and can be construed so that both may be preserved. Congress never intended to destroy the plainly expressed, required, evidentiary basis for decision by the Board."

The argument of petitioner, commencing on page 22 of its brief and closing on page 25, is simply an argument as to what in petitioner's opinion the statute should provide and not what it does provide. The answer to this argument is, as this court has so often said, the court will not concern itself with whether or not the statute might have been enacted in form otherwise than it was, or make any inquiry as to the wisdom of the statute.

Commencing on page 25 petitioner seems to argue that the Review Board has conferred some great boon upon applicants for review by permitting them to familiarize themselves with the record, which will be considered when their cases come on for hearing. Respondent contends here as he did in his brief in opposition that there is no question of fairness involved. If there is a question of fairness, then it is decidedly unfair to require a party to any proceeding to be required to rebut evidence which the trier of the facts is precluded from considering.

B. The legislative history of Section 302 is of no aid to the petitioner, the respondent, or the Court.

While purportedly devoting 15 pages of his brief to the legislative history of Section 302, petitioner has actually written a most complete and informative history of Section 301, a part of the statute in which we are not here in any way concerned.

It is apparent to anyone who will attempt to trace the legislative history of Section 302, and it is clearly shown from the argument and footnotes contained on pages 27 to 42 of petitioner's brief, the legislative history of Section 302 is as short and simple as the annals of the poor. Actually, Section 302 has no legislative history. Section 302 was written into the Servicemen's Re-Adjustment Act when it was in conference, and there is nothing in the Committee reports or the Congressional debates which throws any light upon the meaning of the term, "service records", or the question as to whether or not the Congress intended that the statute should be read as it is written, or whether in intending to enact one statute it enacted another.

Section 301 sets up what are known as Discharge Review Boards. These Boards function entirely separately and differently from Disability Review Boards and are intended to accomplish entirely different purposes. Disposition of applications pending before a Discharge Review Board is entirely different from that before a Disability Review Board. After a Discharge Review Board has completed its deliberations its findings are final, subject only to review by the respective Secretaries of the Military Departments. On the other hand, the Secretaries of the respective Military Departments have no authority to review the action of a Disability Review Board. Their functions in that respect are limited to transmitting the findings of the Disability Review Board to the President for his approval or disapproval and orders in the case.

That section of the petitioner's brief dealing with the legislative history of 301 is liberally sprinkled with footnotes

containing much irrelevant matter. It discusses the various types of discharges by the respective Military Departments and deals extensively with compensation payments, hospitalization benefits, and various other statutory provisions for assisting disabled soldiers. It is submitted that none of this is cognate to the questions in this case and should be disregarded by the Court.

C. Administrative construction of a statute will not be followed by the courts when a different practice is required.

Petitioner argues (Petitioner's Brief pp. 42-45) that the Court below erred in not deferring to what it is claimed has been the consistent administrative construction of the statute. In support of this contention petitioner cites *U. S. v. Citizens Loan & Trust Company*, 316 U. S. 209, quoting from the court's opinion at p. 214 to the effect that an administrative construction "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." Certainly this is the general doctrine, but the question in this case is not whether there has been administrative construction, but whether (1) there was any necessity for construction and (2) whether the administrative construction is correct. The Court below ruled (R. 28) "the statute is clear; and the violation thereof by the Board is plain."

If the statute is clear there is plainly no necessity for construction; if the violation by the Board is plain then the administrative construction is "clearly wrong and a different construction is plainly required."

Respondent's contention is, as it has always been, that the regulations adopted by the War Department directing the Board to consider "all available War Department and/or other records pertinent to the health and physical condition of the applicant" is directly contrary to the letter and the spirit of the statute, is therefore plainly unreasonable and the rule of deference to the administrative con-

struction will be disregarded by the courts for the very reason that being unreasonable it is "clearly wrong" and therefore a different construction "is plainly required."

D. There is no showing of legislative acquiescence in the construction placed upon the statute by petitioner.

Petitioner in his brief, pp. 45 to 48, argues that since Section 302 was re-enacted on December 28, 1945 without any changes that are particularly pertinent, that the re-enactment should be construed as acceptance and approval of the administrative practice. The fact that Veterans' organizations described on page 48 of petitioner's brief as "informal watch-dogs" of the Review Boards, have expressed no dissatisfaction with the construction placed upon the statute by the petitioner in no way proves that the question as to the construction of the act was ever before the Congress, and that in re-enacting the statute as it did it in any way intended to approve such a construction.

II.

The Same Limitations Apply to a Re-Hearing Before an Administrative Board as Apply to an Original Hearing.

Petitioner cites no case in support of its argument (Petitioner's Brief pp. 48-50) that where an administrative body as the result of exercising its discretion has granted a re-hearing that it may attach whatever reasonable and fair requirements it wishes in granting a re-hearing. Respondent has been unable to find any authority one way or another, but it is believed that if a hearing Board is restricted as to the types of evidence which it may consider on the original hearing that it necessarily follows that upon re-hearing the same restrictions will apply, otherwise a Board by granting a re-hearing could make a mockery of the entire administrative process, and by granting a re-hearing subject to such conditions as it should see fit to impose could, in effect, defeat the very purposes of a re-

hearing and prevent the person granted such re-hearing from rectifying the errors the allegations concerning which were the very basis for the re-hearing.

III.

Respondent Exhausted His Administrative Remedy to the Extent That He Was Required to.

The facts as shown by the record, disclose that petitioner used every method available to obtain administrative correction of the error of which he complained.

When the time for rehearing approached and respondent and his counsel discovered that the Veterans Administration reports had been added to his records, immediate request was made for their elimination (Complaint Par. 9, R. 4-5). This request was refused and reconsideration was asked and refused. This, respondent contends, was an exhaustion of his administrative remedies and resulted in injury to him.

He has not only a right to review, he has a right to review on a certain record. Denial of review on such a record is denial of the statutory review which the Congress intended he should have, and in substitution therefor a review according to the views of the Department of the Army.

Having been placed in a position where he is injured, where there is no possibility of rectification of the injury by those who have perpetrated it, there can be no question of prematurity in seeking court relief.

> "A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that the need is sufficiently compelling to justify judicial intervention even before a completion of the administrative process." *Eccles* v. *Peoples Bank*, 333 U. S. 426, 434.

This case is the exact opposite of that in *Eccles* v. *Peoples Bank, supra*. There the bank sought a declaratory judg-

ment against the Federal Reserve Bank. There the bank had been admitted to the Federal Reserve System upon a condition requiring it to withdraw upon notice if an interest in the bank should be acquired by a holding company without the Board's prior approval. Shares in the bank had been acquired by a holding company and the bank had advised the Board of this fact and requested to be relieved of the condition. The Board refused this request and the bank, fearing that the Board might invoke the condition, sought a declaratory judgment to have the condition declared invalid. In holding that the action was premature the Supreme Court, speaking through Mr. Justice Frankfurter, said at Page 432 of the opinion:

> "Thus, the Bank seeks a declaration of its rights if it should lose its independence, or if the Board of Governors should reverse its policy and seek to invoke the condition even though the Bank remains independent and if then the Directors of the Federal Deposit Insurance Corporation should not change their policy not to grant deposit insurance to the Bank as a non-member of the Federal Reserve System. The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determinations."

The respondent did not seek judicial relief upon any speculative state of facts. There is no question here as to whether or not the disputed Veterans Administration reports would have been included in the appellant's record. It had been definitely ruled that they would be and appellant was not premature in seeking judicial relief.

A. The exhaustion doctrine does not apply in all events to all cases, nor was respondent required to proceed to hearing and decision before he could invoke the protection of the court.

If the respondent had proceeded to hearing without first having sought Court relief, he would never have been in a position to request relief from any Court subsequent to

hearing and decision. The statute provides that after the Army Review Board has reached a decision that decision "shall be transmitted to the Secretary of the Army and shall be laid by him before the President for his approval or disapproval and orders in the case." That a court may not review the action of the President in such a case is established by many cases, one of the most recent of which is *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corporation*, 333 U. S. 103. Conceding, *arguendo*, that there would be some method of obtaining judicial review of the decision of the Board immediately after it had been filed, there would be no way to restrain consideration of such decision by the President and his action pending court review would render the question moot. *U. S. ex rel. Norwegian Nitrogen Products Company* v. *Tariff Commission*, 274 U. S. 106, 111-112.

That the exhaustion doctrine is not to be applied in all cases and under all circumstances is well exemplified in a recent case in this Court.

In *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, the Supreme Court ruled that a "jurisdictional frustration" on an administrative level could be disposed of by a declaratory judgment determining which of two divisions of the National Railroad Adjustment Board had jurisdiction over disputes involving railroad yardmasters. The two divisions had been unable to agree as to which had jurisdiction (surely a matter for decision by the administrative board) and one of them applied for a declaratory judgment that it had sole jurisdiction. As stated review was granted, although there had been no exhaustion of administrative remedies and under a statute which the Court had held in two recent previous cases had been drawn in such a way as to preclude judicial review of jurisdictional disputes arising under the statute.

The usual arguments for applying the exhaustion doctrine, such as interference with orderly administration, adequate remedy at law, use of the agency's specialized

understanding and statutory requirement of final order do not apply here. Granting of the relief sought here will insure orderly administration, not interfere with it; there is no remedy at law; the agency's specialized understanding has been used to distort the meaning of the term "service records"; there is no provision for review of a final order and consequently no statutory requirement therefor.

B. When an administrative body has taken action which denies a basic right, the courts may and do review such action before the administrative process has been completed.

The requirement that the administrative process must be completed before recourse may be had to the courts, is like most rules of law, subject to exceptions and qualifications. It is true that in many cases dealing with preliminary and procedural rulings the courts have declined to intervene until a final order, entered by the administrative body, had terminated the proceeding before the administrator and the whole proceeding would be thus ripe for review, and the reviewing court could thus dispose of procedural questions and those on the merits in one proceeding. In those cases, however, there has been a statutory right of review before a specified Court. In this case there is no provision or review and it is highly doubtful if the final order will be reviewable.

The courts, however, have never held that they were powerless to intervene in cases where a statutory, equitable, or constitutional rights was denied and where there was no adequate remedy to correct the wrong by Court review after the matter had proceeded to final disposition by the administrative agency. Illustrative of the application of this rule are the following cases:

Utah Fuel Company v. *National Bituminous Coal Commission*, 306 U. S. 56. In that case plaintiff, a producer of coal had, in conformity with statutory command fur-

nished the Coal Commission with certain cost figures. Thereafter, the Commission announced that it would give public notice of a hearing and would permit the cost figures to be introduced in evidence. Plaintiffs objected on the ground that the disclosure of the cost figures was prohibited by the statute; the Commission ruled otherwise, and plaintiff sought an injunction in the District Court for the District of Columbia. That Court dismissed for failure to state a cause of action; the Court of Appeals concluded that the District Court had no jurisdiction. The Supreme Court held that this was error; that the District Court had jurisdiction but properly dismissed on the merits.

At pages 59 and 60 the Court said:

> "We are unable to accept the view of the Court of Appeals. The District Court correctly ruled that the bill fails to state a cause of action and for that reason properly directed the bill dismissed.
>
> "A question cognate to the one here presented was before us in *Shields* v. *Utah Idaho C. R. Co.* (305 U. S. 177, ante, 111, 59 S. Ct. 160), decided December 5, 1938, the date of the Court of Appeals' decision herein. We there declared, although determination by the Interstate Commerce Commission that a railroad was not 'interurban' did not constitute an 'order' reviewable under the Urgent Deficiencies Act of October, 1913, nevertheless, in the circumstances disclosed, it could be subjected to judicial review by bill in equity. 'Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions.'"

Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity. The jurisdiction of a District Court is to be "determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether

well founded or not." *Hart* v. *B. F. Keith Vaudeville Exch.*, 262 U. S. 271, 273; also *Binderup* v. *Pathe Exch.*, 263 U. S. 291, 305; *United States* v. *Archibald McNeil & Sons*, 267 U. S. 302, 307.

In *United States ex rel. Kansas City Railway Co.* v. *Interstate Commerce Commission*, 252 U. S. 178, the Supreme Court held that the Interstate Commerce Commission could be compelled by mandamus to receive evidence where the statute had laid upon the Commission the duty of deciding a matter which required consideration of the proffered testimony. The writ of mandamus was applied for and issued before the final order disposing of the case was filed by the Commission.

Perkins v. *Elg*, 307 U. S. 328, involved a proceeding for an injunction against the Secretary of Labor to restrain that official and the Commissioner from prosecuting proceedings for deportation against Elg and against the Secretary of State from refusing to issue a passport to her upon the ground that she was not a citizen of the United States and also for a declaratory judgment that she was a citizen of the United States. The suit originated in the District Court for the District of Columbia, the relief prayed was granted except as to the Secretary of State; the Court of Appeals affirmed (69 App. D. C. 175, 99 F. (2d) 408) and the Supreme Court affirmed but modified the decree to include the Secretary of State. Here was a clear interference by the judiciary in an administrative proceeding before its conclusion. The Court of Appeals plainly recognized this by saying at page 180:

> "There can be no doubt that the lower court had jurisdiction of the several defendants and that it has jurisdiction of the subject matter of the suit. There is no other proceeding at law by which appellee could obtain an adjudication that she is a United States citizen,—certainly none by which she can obtain that adjudication without being subject to arrest and confinement until her case may be heard on a petition of habeas corpus. Appellants, Secretary of Labor and

> Commissioner of Immigration, are required by law to deport aliens illegally in this country and in accordance with law they have threatened her with arrest and deportation."

Even though court review by habeas corpus after arrest may be an unpleasant method it is nonetheless a review, but the three courts which decided the *Elg* case evidently felt that in view of the fact that under the Constitution Elg was a citizen and had a clear right to remain in this country, she would not have to "exhaust her administrative remedies" but was entitled to enjoin the administrative proceeding to deport her. The fact that the Secretary of Labor had "primary jurisdiction" to determine whether or not Elg was an alien or a citizen did not impede the courts in giving her the relief to which she was obviously entitled.

An authoritative discussion of the right to assert in the courts a statutory right is found in *Dismuke* v. *United States*, 297 U. S. 166 where the Court by Stone, J. states at page 172:

> "But, in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his. *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551; *United States* v. *Atchison, T. & S. F. R. Co.*, 249 U. S. 451, 454, 63 L. ed. 703, 704, 39 S. Ct. 325; *Ness* v. *Fisher*, 223 U. S. 683, 56 L. ed. 610, 32 S. Ct. 356. If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, see *Silberschein* v. *United States*, 266 U. S. 221, 225; *United States* v. *Williams*, 278 U. S. 255, 257, 258; *Meadows* v. *United States*, 281 U. S. 271, 274; *Degge* v. *Hitchcock*, 229 U. S. 162, 171, or by failing to follow a procedure which satisfies elementary standards of

fairness and reasonableness esential to the due conduct of the proceeding which Congress has authorized, *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 330, 331. But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled."

The fact that petitioner has ruled that he will interpret the statute, and will decide what documents are to be included in appellant's record is in no way binding upon this court.

"An agency may not finally decide the limits of its statutory power. That is a judicial function."
Social Security Board v. *Nierotko*, 327 U. S. 358, 369.

IV.

Mandamus Is the Appropriate Remedy.

Respondent has no quarrel with the general principles stated in petitioner's brief commencing on page 50. Respondent contends, however, as he did below and as the Court of Appeals ruled that the statute under consideration is clear and unambiguous and requires no construction. If it requires construction, then the meaning of the term "service records" is so free from doubt, especially to military men, that the construction placed upon it is so clearly wrong that it may be set aside by mandamus.

The reports of this Court and the Court of Appeals for the District of Columbia abound with cases dealing with mandamus. Respondent sees no reason to cite and discuss these many cases, as the rules stated therein are not open to dispute, and respondent feels that they are of little aid in deciding the question involved in this case. As stated by the Court of Appeals in its opinion (R. 26) the hornbook rule has been recently well stated by that Court (*Hammond* v. *Hull*, 131 F. 2d. 23, 25) as follows:

> "The writ [mandamus] should be used only when the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory . . . ."

The case of the *United States ex rel* v. *Interstate Commerce Commission*, 252 U. S. 178, respondent submits is closely related to this case. In that case an action had been brought to compel the Interstate Commerce Commission to consider evidence which a statute had expressly required it to consider. There, as in this case, administrative action had not been completed. It seems obvious to respondent, and we urge upon the Court, that if mandamus will lie to compel the consideration of evidence which a statute requires to be considered that it necessarily follows that mandamus will also lie to compel the exclusion of evidence which the statute forbids.

The respondent stresses again, as he did in his brief in opposition and also in the Courts below, that this action in no way attempts to obtain judicial control over the merits of the case. If the decision of the Court of Appeals is permitted to stand, the case will proceed to hearing before the Disability Review Board without any intimation from any Court as to how the respondent's application for review should be decided. For this reason respondent submits that *Reaves* v. *Ainsworth*, 219 U. S. 296, even though it involves the case of a discharged Army officer has no bearing on this case as in *Reaves* v. *Ainsworth*, it was attempted to have the Court substitute its judgment for that of any Army Board, and to annul an order of the President discharging the plaintiff from the Army.

CONCLUSION.

Respondent submits that the decision of the Court of Appeals is correct and should be affirmed.

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